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SELECTED CASES

ON

REAL PROPERTY.

SELECTED AND ARRANGED FOR USE IN CONNECTION WITH THE AUTHOR'S TREATISE ON REAL PROPERTY.

BY

CHRISTOPHER G. TIEDEMAN, LL.D.,

Author of Treatises on Real Property, Commercial Paper, Limitations of Police Power, Etc.

ST. LOUIS, MO.:
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1897.

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PREFACE.

For the past five years there has been a very energetic discussion among the legal educators of the country, in which the American Bar Association have taken an active part in their successive annual meetings, as to the merits of rival methods of legal education. A careful analysis of these discussions seems to me to reveal most clearly that in the future the method of instruction, that will prevail in the great majority of the law schools of the country, will be based upon the twin principles of *exposition* and *illustration: Exposition*, by means of the formal lecture or by recitation based upon the previous study of the text-book; and *illustration*, by the use of selected cases, which will illustrate the application of the principle in actual litigation. It is undoubtedly true that the need of illustration has been always felt by the teachers of law, as long as law schools have been in existence; and until recently, they have attempted to supply this want by referring the student to particular cases, to be found in the official or other published reports, and by the establishment of moot courts. The moot courts have proven unsuccessful everywhere; and in most law schools they have been abandoned. The professorial reference to cases has not proven altogether successful, either because the student would not take the trouble to read the cases; or because there were not enough copies of the report in the law school library, to enable all the students to read the case referred to. This inefficiency in the older method of instruction, under the influence of Harvard's advocacy of the pure case method of instruction, has led to the publication of a number of selections of cases, to be used in connection with text-book and lecture.

My efforts in the production of legal treatises, adapted for use in law schools as text-books, have met with such great favor, that one or more of them are now in use in thirty-six law schools. From many of the professors, who use my text-books, have come the request that I publish a volume of selected cases, adapted for use in connection with my text-books. Believing as I do that this will be the ultimately established method of instruction in law schools, I have begun the preparation of these

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collections of cases, and herewith present the volume of "Selected Cases on Real Property." The cases are selected to illustrate the principles expounded in the text-book, and are arranged, as nearly as possible, in the order of discussion there adopted. Inasmuch as the cases here presented are intended to illustrate the practical application of legal principles to litigated causes in this country, the latest American cases of merit, which could be found, have been selected, rather than old or English cases.

While this volume is specially prepared for use in connection with my text-books it can be successfully employed along with any other treatise, or as an aid to students in a course of lectures.

CHRISTOPHER G. TIEDEMAN.

NEW YORK CITY

INTRODUCTION.*

METHODS OF LEGAL EDUCATION.

The question of legal education is receiving more attention in this country than it has ever before had given to it. This great manifestation of interest in discussions over the merits of different methods of instruction cannot fail to be productive of great good by the detection of whatever is faulty in each of the so-called methods of instruction, and the possible construction of a new system, composed of whatever is found to be good in the several prevalent methods. But the caution must be observed that, after all, no iron-cast method of instruction can be successful in actual application, however flawless it may seem to be in theory. The individuality of the teacher must not be paralyzed by any fixed system of instruction. For the native talent of the professor for teaching counts for a great deal more than the peculiarities of his method of instruction. And very often the strong personality of the teacher will successfully conceal the defects of the methods which he employs. But after due allowance has been made for the full play of the teacher's individuality, methods of instruction may be made to conform to general principles, and may be improved or made worse according to the correctness of the fundamental principles upon which they are established. Bearing in mind that a very poor and fundamentally faulty method of instruction may be made to produce satisfactory results by the indefinable and immeasurable influence of a truly great teacher and eliminating, as far as possible, this personal equation from the criticism of different methods of instruction, there is but one way to ascertain with any reliability their respective merits and demerits, and that is by a criticism of the soundness or unsoundness of the fundamental conceptions of the law upon which they are based.

In the first place, a distinction should be made between the relative merits of methods of instruction and of the materials used in imparting instruction. If I have not entirely misconceived the character of the discussions which have been provoked by recent events, and by the active interference of the American Bar Association, they principally relate to the character of the materials employed in giving instruction, and not to rival methods of instruction. There are but two essentially different methods of legal instruction in use in this country, viz.: the European system of formal lectures with or without the collateral aid of the seminarium, and on the other hand, instruction by a combination of recitations and informal discussions of questions and principles of law in proportions varying with the individuality of the teacher. In many of the law schools, probably in the great majority of them, both methods are employed to some extent, but only two prominent law schools

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employ the first method more or less exclusively. If I have not been misinformed, the other prominent law schools of the country, as well as the great majority of the smaller schools, employ in the main the latter method of instruction, *i. e.*, by recitation and informal discussion by teacher and student. If the law students of any one school were composed entirely of college-bred men, and therefore possessed of more or less well-trained minds, the former method of instruction is in my judgment unquestionably superior to the latter. For if the duty of the teacher is to explain and discuss the principles and rules of law, he can do so more effectively and can accomplish more in a given time, if he is not obliged to take up his time with catechising the students, and listening to their opinions, which even in the case of college-bred men must be the immature reflections of a tyro. And that method of instruction would be brought to a state of comparative perfection, if the lecturer were to place in the hands of his hearers an elementary treatise on the subject of his instruction, whose treatment and analysis he follows in his lectures so that the student can come to the class-room already possessed of information concerning the elementary principles, sufficient to enable the professor to proceed directly to the more profound discussions of the subject, and to the practical application of these principles to the variety of cases, which the teacher can best draw from the adjudication of the courts. This is the system which I learned to admire while sitting under the skillful instruction of the celebrated von Ihering, of the University of Goettingen.

But the formal lecture is not suited for the ordinary American law school, for the reason that the average law student does not come to the law school with such a trained mind as a college course generally insures. I cannot think there is much doubt that as long as the law schools are obliged, in the consideration of the highest interests of the legal profession, to accommodate themselves to the needs of students who come to them with untrained minds, the latter method of instruction, *i. e.*, of recitation and informal colloquies, is the best adapted to our present needs. I believe that the legal profession generally entertain the same opinion. At any rate, with very few exceptions — and the most prominent law schools do not constitute these exceptions — the common method of instruction is the one described as a combination of recitations and colloquy.

The most serious discussion relates not so much to methods of instruction, in the sense in which I employ the terms here, as to the materials used in giving the instruction. The important inquiry, to which I understand myself to have been invited to principally direct myself, in the present instance, is concerning the relative value of the use of text-books, or treatises, or of leading adjudicated cases, in giving legal instruction. As I understand it, both parties to this controversy substantially agree that the instruction in the class-room should generally assume the informal character of a recitation and colloquy, their point of difference being the materials from which the student is to recite, and about which the colloquy is to be had.

The relative value of text-books and of adjudicated cases in giving legal instruction can only be determined, as I stated above, by a criticism of the conceptions of law which underlie the contention, and the aims held in view in providing for legal instruction.

There are four things to be attained by systematic legal instruction, and no

system is complete which does not make provision for the attainment of all of them, viz.: to teach (1) what is the law; (2) how law is evolved or made; (3) how to extract the ruling principle of law from an adjudicated case; (4) how to apply known principles of law to new cases as they arise.

No one would deny that the study of actual cases will alone satisfy the third and fourth requirements of legal education, as just set forth. Nor can there be much doubt that a student cannot learn how law is made, unless he studies adjudicated cases, even where the particular matter is regulated by statute. For the statute does not always contain the true living rule of conduct. The true rule or rules, which are produced by the enactment of a statute, are not to be found in the letter of the statute, but in the construction placed upon it by the courts. The law student cannot find in the Statute of Frauds all that is necessary for him to determine when a writing is necessary to the validity of a contract. He must look for an accurate answer to his inquiry to the thousands of cases in which the provisions of the Statute of Frauds have been construed and modified in their application to particular cases, or he must go to some reliable treatise on the subject, whose author has made the investigation for him. The student should be made to understand that the edicts of the legislature are not in themselves necessarily living law, except so far as they reflect the prevalent sense of right, but that the real rule of civil conduct is to be extracted from the cases, in which the statutory rule finds in its application to individual litigation the more or less serious modification which is necessary to bring it into conformity with the popular sense of right.

The second and third aims of legal education, as here differentiated, only serve to teach the student how to discover for himself what is the law, while the fourth gives him an opportunity to learn how to make a practical use of his legal knowledge. Legal educators may differ as to the amount of time which should be devoted in a law school course to the attainment of these three elements of professional education; but they cannot seriously deny that the study of cases is the only method by which this instruction may be imparted. Nor can there be much cause for doubt or dispute that the major part of a law school course must be devoted, not to teaching how law is evolved, or how to extract the law from adjudicated cases, or how to apply it to new cases, important as these things are, but to teaching what is the law, what are the principles, general and special, which give logical shape to all systems of jurisprudence. And it is at this point in the discussion of educational methods, that there is the greatest cause for contention.

There is very little room for doubt that, at least in the Anglo-Saxon world, the adjudicated cases are the great reservoir of legal learning, and that the original investigator must go to these cases for the materials out of which he may construct our jurisprudence, or satisfy the more modest desire of ascertaining what is the law of the land on a particular subject. But he would use the cases not for the purpose of learning directly from them what is the law, but to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence. If the chemist or physicist, or biologist, wants to learn what is already known about their respective sciences, he goes to the treatises in which are recorded the results of the investigations of others. He does not open the book of nature, and expect to find therein the principles set

forth in such intelligible terms as that he who runs may read. He goes to his library, instead of to his laboratory.

The adjudicated cases constitute nothing more than materials out of which the scientific jurist is to construct a science of jurisprudence. They are not law in themselves, they are but applications of the law to particular cases. Law is not *made* by the courts, at the most only promulgated by them. Any one who believes that judges are free agents in the rendition of decrees and judgments, may be inclined to question the soundness of the last proposition. But he who is fully persuaded that law is not the independent creation of the judicial mind, but is the resultant of the social forces reflecting the popular sense of right, will readily give his assent. The judge is but an instrument for the promulgation of this popular sense of right in its particular application to the cause at issue. When I first met with the proposition, which is so often enunciated by legal writers, as a proper and satisfying explanation of the relation of statutory law and "judge-made" law, as Bentham contemptuously calls it, that the judge, in rendering a decision on a novel question, or in modifying a principle of law which has been previously enunciated, does not make law but only declares what was the pre-existing, although perhaps as yet unexpressed, law — I was inclined to repudiate the doctrine altogether as a fiction, and to give my approval to Bentham's criticism of this judicial liberty. But when I looked deeper into the origin of the law, and satisfied myself that all law, so far as it constituted a living rule of civil conduct, whether it takes the form of statute or of judicial decision, is but an expression of the popular sense of right through the popular agents, the legislator or the judge as the case may be — then a new light was thrown upon what I was inclined to pronounce an unwarrantable fiction, and I believed all the more firmly that neither the judge nor the legislator makes living law, but only declares that to be the law, which has been forced upon them, whether consciously or unconsciously, by the pressure of the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society.

If this be the true conception of the origin and development of law, then it must be conceded that learning what principles of law have been given birth or have been more or less modified in a particular decision or set of decisions is not an elementary work which may be intrusted to beginners, or which law students, at least in the earlier stages of their professional training, may be expected to do satisfactorily to themselves and to their teachers. In the first place, the whole law or any appreciable part of it, on a particular subject, cannot be learned from the study of a few leading cases, but only from a very large number of cases. For example, in order to learn the law in relation to the requirements of the statute of frauds, one would have to read not a few cases, but thousands of cases. To teach law by cases, — granting for the present that it is possible to teach law as a science by cases alone — it would require an incredible length of time to teach even the elementary law.

But apart from the physical impossibility of reading enough cases in order to enable the student to learn the law in the time to which the exegencies of American life require a law school course to be limited, the legal tyro is not mentally capable of extracting the principles of the law from adjudicated cases, even though he be a college bred man, and possessed of more than the average of ability and industry. A few men of extraordinary mental powers may be able

to collect together and formulate correctly, by the study of cases alone, the principles upon which the adjudications rest, but the average student will, by such a system of instruction, if pursued exclusively, be impressed with the great weight of judicial precedent, and he will become, what is so generally deprecated, a case-lawyer, who thinks the whole business of advocacy consists of persuading the court that the cases he cites in support of his side of the controversy, are to be followed, not because they enunciate a profound scientific truth, but merely because they have given judgment for the plaintiff or defendant on a similar statement of facts. The higher aim of their instructors to make of them conspicuously original investigators in the law is lost on the average law students. Law students, in the present state of public opinion, are inclined to consider rules of law, as they are enunciated by the court, as distinct and independent propositions, which may be strung together in a digest in some more or less orderly manner, but which have no logical connection, leading up to the formation of a compact scientific system of jurisprudence. And it strikes me that this evil, so far at least as the average student is concerned, will be intensified by telling him that he must learn the law from the cases alone. The average student will not do the necessary work in order to be able to construct for himself, out of the mass of judicial decisions, an orderly and logical presentation of the fundamental principles, which are the groundwork of every system of jurisprudence, and a knowledge of which is absolutely essential to any scientific conception of the law as a whole, or in the detailed application to special cases in actual practice.

If it taxes the mental energies of the most experienced and skillful of our law writers to present accurately and logically the law on a given subject, so as to guide and not to mislead the active practitioner and judge in the winning and settlement of judicial contests, we certainly cannot expect the student to do this work satisfactorily or accurately. One of the most successful of our American legal authors once observed in my presence that he often found it impossible to discover the common principle by which conflicting decisions, even of the same court, may be reconciled. He did not refer to cases in which there was a direct repudiation of a prior decision, but to those cases in which there was an express or implied confirmation of the prior decision, but with so great a departure in practical results, as to force one at least to the conclusion, that the latter decision imposes a serious modification of the rule of law as laid down in the prior decision. To present in a clear light the rule of law, as it emerges in a modified form, from the clashing interests represented by two or more decisions requires the skill and leisure of the experienced legal author. The busy practitioner has not the time, and the tyro has not the skill or experience to enable him to escape the confusion of ideas which the reading of conflicting decisions occasions.

But even if the student is capable of doing this work from which old practitioners shrink, why should he be forced to learn the law exclusively in this laborious and difficult manner? Must he be denied the privilege, which the students of medicine, chemistry and the other sciences enjoy, of learning at the outset of his study from treatises what other original investigators have discovered? Like the student of the different sciences, the law student must learn how to make original investigations for himself, and diagnose, so to speak, the principles of law from the cases in actual litigation. But no reason

can be given why he must learn the whole science of the law by his own investigations in the undigested mass of raw material in the shape of adjudicated cases. No medical school can pretend to give a complete course of instruction at the present day, without introducing into its curriculum a comprehensive course of clinics. Nor does the professor of physics or chemistry teach these sciences exclusively by the use of the text-books and pictorial representations of the various experiments as was once the practice. But the instructors of these sciences have not discarded the treatise; they have only supplemented the use of the treatise with the resort to the laboratory and operating room.

The difficulty in reaching a common agreement in the present discussion over methods and means of legal instruction is the difficulty which is often experienced in finding the middle and true ground of a controversy. Impressed by the defects of the older systems of instruction, in which the law student was presented with more or less abstract propositions of law, with the aid of text-books, which often were either nothing more than digests of the cases, and put together in an illogical and disorderly manner, or whose statements of the law were so loose and inaccurate as to prove misleading; and more impressed with the necessity of "legal clinics" in the course of instruction in the law school instead of being left for acquisition in the law office, the advocates of instruction by cases have gone to the opposite extreme of placing too high a value upon the study of cases, and of unduly depreciating the value of the study of theoretic law, apart from learning it through the medium of practical law. But notwithstanding their undue appreciation of the study of cases, they tacitly concede its inefficiency as a sole means of learning the law, by accompanying the study of the cases with a glossary or commentary of that part of the law, which is treated in the cases. The cases are therefore used merely as illustrations of the law which is set forth in the commentary, which is either given to the student in printed form or imparted by the professor in his class-room instruction. If the commentary consists of a scientific and logical treatment of the branch of law selected, corresponding to the methods adopted by the better legal treatises of modern times, the instruction by cases differs only from the instruction with the aid of the best text-books, in that the illustrations of the law constitute the text, while the law is put into foot notes, and has the disadvantage of misleading the student as to what is, and what is not the nature of the law. If the glossary or commentary is nothing more than a digest of the cases for which space could not be found in the text, then the employment of such a book in a class-room instruction will not avoid many of the evils which were complained of under the older *regime*.

The advocates of instruction by the use of cases have effected an important reform in legal education by arousing the law schools of the country to the importance of infusing more life into their instruction, and of introducing into their curricula what I would call "legal clinics," and for this great good the legal profession should be grateful to them. But the great danger of driving out of the schools all scientific study of the fundamentals of the law in the unchecked study from the cases of isolated propositions of the law, ought not to be lost sight of. I think we may, in this connection, consider with profit the order of legal instruction pursued at the German universities. In the first half of their three years' course, the student gets nothing but theoretic and relative elementary law, which he gleans from the lectures of the professor and

from treatises, corresponding to the English and American text-book. The same course of instruction is maintained to the end of the university course, except that the seminarium is added, in which the student gets his first insight into practical law, and where the method of instruction is practically a study of law by cases, except that the cases are in the main hypothetical. When the student receives his doctorate, he is enrolled among the officials of the court as a *referendar*, performing duties as an assistant to the judges, which are calculated to give him the practical experience which is aimed at by the law in many of the American States in requiring of candidates for the bar an apprenticeship or clerkship in a practicing lawyer's office.

If I were called upon to establish a course of legal instruction, I would follow the German methods as nearly as the situation and public opinion in America would allow. I would make the course in the law school three years. During the first year, I would confine the student to the study of the fundamental principles of the law with the aid of the most approved treatises, and without any resort to cases, except by the instructor, who would use them in the classroom for the purpose of illustrating the text. The second year would be in the main similar to the course of instruction of the first year, with a partial introduction of "legal clinics" and of the seminary methods. In the third year the instruction would largely consist of the study of cases, and of practice and pleading.

During the entire course in the law school I would place the ban upon the resort of the student to the law office. His clerkship in the law office should begin upon his graduation from the law school.

Although the views here presented, reflect no one's opinions but my own I desire to say in conclusion that, in the University of the City of New York, of whose faculty I am a member, no one method of instruction is followed exclusively; all methods are in turn adopted so far as they seem to serve the purpose of making lawyers out of the young men who come to us; and each professor is permitted to adopt whatever methods will enable him to give the best expression to his own individuality.

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SELECTED CASES

ON

REAL PROPERTY.

CHAPTER I.

WHAT IS REAL PROPERTY.

Harris *v.* Scovel, 85 Mich. 32; 48 N. W. 173.
Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49; 52 N. W. 702.
Snedeker *v.* Waring, 12 N. Y. 170.
Plummer *v.* Hillside Coal & Iron Co., 160 Pa. St. 483; 28 A. 853.

Fixtures — Permanent Annexation.

Harris *v.* Scovel, 85 Mich. 32; 48 N. W. 173.

MORSE, J. This is an action in trover for the conversion of 2,000 fence rails, commenced in justice court, and subsequently appealed to the circuit court of Wayne County. Plaintiff recovered judgment in both courts. The plaintiff, in the partition of real estate, February 6, 1886, became the owner of a piece of land 17 feet wide and 1,601 feet in length. There was then a fence on the land which, before the partition, made a lane. She sold the land to defendant October 3, 1888. The deed of conveyance was a warranty deed in the ordinary form. Having no use for a lane on the premises, about a year before she sold to the defendant the plaintiff took down the fence, and piled up the rails on the premises, intending, as she testifies, to remove them to a farm that she owned in Dearborn. She had drawn 84 posts upon this land, and made some preparation to build a board fence as a division fence between her land and that of others, as, at the time the partition was made, it left the premises allotted to her open and unfenced. She testified,

against objection, that at the time she made the agreement with defendant to sell him the land she reserved the rails. There was no reservation in the deed. The rails prior to being piled up by plaintiff, had been in this lane fence nearly 50 years. Plaintiff had no use for the lane after the partition. Defendant testified that plaintiff, when making the agreement to sell, wanted to reserve the rails, but he would not consent to it, and bought the place as it was. The circuit judge submitted the question to the jury, instructing them that the rails piled upon the premises, and not being in any existing fence at the time of the sale, were personal property, and that, unless they found that the plaintiff sold the rails to the defendant — agreed that they should go with the land — she was entitled to recover. The court was right, and the judgment must be affirmed. Rails piled up, under the circumstances that these were, are personal property. There can be no claim that fence-rails are of necessity part of the realty unless they are in a fence, and even in such case they may remain as personalty, if such be the agreement between the parties interested at the time the fence is built. Curtis *v.* Leasia (Mich.), 44 N. W. Rep. 500. The contention made, that plaintiff is estopped from claiming these rails because, following the description by metes and bounds of the premises in her warranty deed to defendant, the deed continues as follows: "Being the same premises which were assigned by said commissioners in partition to Mary E. Harris, * * * together with all and singular the hereditaments and appurtenances thereunto belonging," etc. It is argued that she thereby conveyed these rails, because they were a part of the realty when she received it in partition. We do not consider this statement in the deed to be, or to have been intended to be, a covenant that the premises were to be conveyed to defendant in exactly the same condition as to fences, timber, and growing crops as they were when she received them. Such a construction would be absurd. If the rails must pass under the warranty because of this clause, then she must also account, under such warranty, to the defendant for all the timber standing or crops growing upon the premises, when she received them by partition, which she may have removed since that time and before the sale to defendant. The deed cannot in reason be so construed. Affirmed, with costs. The other justices concurred.

Title to House Erected by Vendee in Possession under Executory Contract of Sale — Vendee Cannot Remove it — Replevin Lies if He Does.

Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49; 52 N. W. 1035.

MONTGOMERY, J. The defendant, on the 18th day of June, 1887, contracted in writing to purchase of one William L. Jenks the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 19, township 7 N., range 16 E. The contract was in the usual printed form, and contained a covenant on the part of the defendant that he would not commit, or suffer any other person to commit, any waste or damage to said lands or buildings, except for firewood or otherwise, for home use, while clearing off the lands in the ordinary manner. Immediately after entering upon the lands he erected a small dwelling house thereon, and lived in it for two years. He then made default in his payments, and the plaintiff, to whom the contract had in the meantime been assigned by Jenks, terminated the contract, and required the defendant to surrender possession. The house was a one-story frame house, 20 by 26, and suitable for the purposes of a dwelling house to be used upon the land in question. After the removal of the house from the premises, it was placed upon a lot across the street, and plaintiff, after demand, brought replevin. The circuit judge directed a verdict for the plaintiff, and the defendant appeals.

Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was, therefore, real estate; *second*, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party. We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. Kingsley *v.* McFarland (Me.), 19 Atl. Rep. 442; Milton *v.* Colby, 5 Metc. (Mass.) 78; Iron Co. *v.* Black, 70 Me. 473; Tyler Fixt. 78. It being severed from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon the land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of Morrison *v.* Berry, 42 Mich. 389; 4 N. W. Rep. 731; and Wagar *v.* Briscoe, 38 Mich. 587, do not

apply. The house remaining personal property in the wrongful possession of defendant, it follows that no homestead right, which consists in an interest in lands, attached.

The judgment is affirmed, with costs. The other justices concurred.

Constructive Annexation of Fixture — Statue and Sun-dial located upon a Lawn for Ornamental Purposes.

Snedeker *v.* Waring, 12 N. Y. 170.

Parker, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. Corliss *v.* Van Sagin, 29 Me. 115; Winslow *v.* Merchants' Ins. Co., 4 Metc. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of Taylor *v.* Townsend, 8 Mass. 411, is entirely removed by the latter authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; Hilliard on Mortgages, 294, note f, and cases there cited; and see Bishop *v.* Bishop, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American courts deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon

principle. All will agree that statuary exposed for sale in a workshop, or whatever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures and statues used to spout water at fountains, were regarded as immovable, or real. Pandects, lib. 19, tit. 1, § 17, vol. 7, by Pothier, 107; though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments. Corp. Juris. Civ., by Kreigel, lib. 19, tit. 1, § 17; Poth. Pand. 109; Burrill's Law Dic. "Affixus." But Labeo held the rule to be "*ea quæ perpetui usus causa in ædificiis sunt ædificii esse; quæ vero ad præsens, non esse ædificii;*" thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by the

civilians, "its destination;" Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, § 17.

And Pothier says that when, in the construction of a large vestibule or hall niches are made, the statues attached ("attachées") to those niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues; and, he says, it is of such statues that we must understand what Papimanus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt:* Pothier de Communauté, § 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap., § 525. But statues standing on pedestals in houses, court-yards, and gardens retain their character of "movable" or personal. 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, § 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work, page 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("*vide choquant*"), a foundation and base no longer appropriate or useful. Ib., § 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament. 2 Ledru Rollin, Répertoire Générale, 514, § 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of

the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its base, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the court of Cassation in France, in Hornelle *v.* Enregistr, 2 Ledru Rollin, Journal du Palais, Répertoire, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent founda-

tion in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues, placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support. (See to that effect, Oakland Cemetery Co. *v.* Bancroft, 161 Pa. St. 197.)

It is said the statues and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only in their own weight. Yet that has been found sufficient to preserve many of them undisturbed for 4,000 years. Taylor's Africa, 113 *et seq.* And if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the pyramids of Egypt, or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guarantee of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

Estate in Coal Mines Separate from Estate in Surface.

Plummer *v.* Hillside Coal & Iron Co., 160 Pa. St. 483; 28 A. 853.

Appeal from court of common pleas, Lackawanna County; Fred. W. Gunster, Judge.

Trespass q. c. by Emma A. Plummer against the Hillside Coal & Iron Company and the Lackawanna Coal Company, Limited. Judgment for defendants. Plaintiff appeals. Affirmed.

WILLIAMS, J. The learned counsel for the appellant states the point in controversy very fairly and clearly in the opening sentence of his printed argument. He says, "The contention in this case is confined to the effect and subsequent history of the Calendar lease dated the 1st of October, 1828." His position is that the lease granted only an incorporeal right to the lessee, to be exercised upon the premises covered by the lease. The appellees, on the other hand, contend that it granted the coal in place, under the land, absolutely. The words of the instrument upon which this question depends may be put together thus: "Samuel Calendar * * * doth lease and to farm let to Thomas Merideth * * * all the land that he now holds, * * * and the lease is to continue for the term of one hundred years from this day. Possession of the leased premises shall extend only to their use as a coal field. The lessee shall have full power and possession to search for coal anywhere on the leased premises, in any manner he may think proper, to raise the coal, when found, from the beds; to enter and carry away coal; and to sell the same for his own benefit and profit. He may occupy whatever land may be useful or necessary as coal yards, * * * for roads for transporting the coal; and in case it may prove necessary for securing the full enjoyment of the premises aforesaid as a coal field, as aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper." The purchase money or price of the coal is fixed at $200. If the coal proved abundant, and of a given thickness, then another $100 was to be paid. In addition to this the sum of $1 per annum was to be paid, as rent. The lessor reserved out of this grant the right, for himself and his heirs, to take coal for their own use, so long as they should reside on the land. This instrument contemplated a sale of the coal under the leased premises at a fixed price, to be increased $100 if the quantity of coal reached the proportions described in it. The right of removal was to be exercised within 100 years. The fact that the instru-

ment is in the form of a lease is not material, when the charter of the transaction is apparent. Kingsley *v.* Iron Co., 144 Pa. St. 613; 23 Atl. 250; Montooth *v.* Gamble, 123 Pa. St. 240; 16 Atl. 594. A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore in fee. Fairchild *v.* Furnace Co., 128 Pa. St. 485; 18 Atl. 443, 444. Such a conveyance operates to sever the surface from the underlying stratum of coal; and after such severance the continual occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the statute of limitations. To affect the title of the owner of the coal, there must be an entry upon his estate, and an adverse possession of it. Armstrong *v.* Caldwell, 53 Pa. St. 294. But the contention that a right to mine coal in the land of another is an incorporeal one cannot be successfully maintained. The grant of such a right is a grant of an interest in land. Hope's Appeal (Pa. Sup.), 3 Atl. 23. When the grant is, in terms or in effect, a grant of all the coal on the lessor's land, this amounts to a severance of the coal from the surface, and vests a title to the underlying stratum in the grantee. Sanderson *v.* City of Scranton, 105 Pa. St. 469. This underlying estate may be conveyed under the same general rules, as to notice as to recording, and as to actual possession, as the surface. After such a severance the possession of the holder of each estate is referable to his title. The owner of the surface can no more extend the effect of his possession of his own estate downward than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations. The owner of the surface can be affected only by the invasion of the surface. The owner of the underlying stratum is not bound to take notice of the invasion of the estates that do not belong to him, but when his own estate is invaded he is bound to take notice. The conclusion thus reached disposes of the title by possession set up by the plaintiff, and of her right to recover in this case.

The appellant cites Oil Co. *v.* Fretts, 152 Pa. St. 451; 25 Atl. 732; Menish *v.* Stone, 152 Pa. St. 457; note 25 Atl. 732, — and other cases in which oil leases were considered, and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil, and, in case oil is found in paying quantities on the leased premises to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land, beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuc-

cessful, and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and, finding nothing, gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the case cited. The difference in the nature of the two minerals, and the manner of their production, have, however, resulted in considerable differences in the forms of the contracts of leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory, and bring to the surface oil that when in place, in the sand rock, was under the lands of adjoining owners, makes it important for each land owner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end, or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases, regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of Oil Co. *v.* Fretts, *supra*, is not capable of application to the lease made by Calendar to Merideth in 1828, for several reasons: First, the Calendar lease is, in effect, a sale of all the coal in the leased premises, and subsequently a severance of the surface therefrom. Second, it is for 100 years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. Third, the consideration of the grant was, not the development of the mineral value of the land, but the price fixed by the agreement, and actually paid to the lessor in money. Upon a careful examination of the several assignments of error, we are all of opinion that the judgment must be affirmed. Judgment will be entered accordingly.

CHAPTER III.

ESTATES IN FEE SIMPLE.

Truesdell *v.* Lehman, 47 N. J. Eq. 218; 20 A. 391.
Ewing *v.* Shanahan, 113 Mo. 188; 20 S. W. 1065.
Siddons *v.* Cockrell, 131 Ill. 653; 23 N. E. 568.

Words of Limitations in a Deed — Heirs Necessary, in Absence of Statute to the Contrary.

Truesdell *v.* Lehman, 47 N. J. Eq. 218; 20 A. 391.

Green, V. C. Warren Truesdell, April 11, 1878, obtained a judgment in the Supreme Court of this State against Michael R. Kenney and others, for $296.41. Execution was issued, and returned unsatisfied, and the whole amount of the judgment remains unpaid. Bridget E. Cheshire, by a deed of bargain and sale dated January 12, 1875, conveyed to the said Michael R. Kenney certain property in the city of Newark, abutting on French and Peat streets, consisting of four lots, the whole tract being 100 feet square. The property seems to be still unimproved and unoccupied. The deed referred to contains no words of inheritance, being drawn to the grantee and his assigns, not to his heirs, and therefore conveyed only a life-estate to Michael R. Kenny. Kearney *v.* Macomb, 16 N. J. Eq. 189; Weller *v.* Rolason, 17 N. J. Eq. 15. Michael R. Kenny died intestate 10 or 12 years ago, leaving Horace J. Kenny, Cecelia R., wife of John A. Flintoff, James Kenny, Lignori Kenny, and Sylvester J. Kenny, his children and heirs at law. Cecelia R. Flintoff died before the filing of his bill, leaving George S. Flintoff and Cecelia K. Flintoff, the infant defendants, her heirs at law. Sylvester J. Kenny, Lignori Kenny, and Horace J. Kenny, after their father's death, executed and delivered to Frank M. McDermitt a deed of bargain and sale dated October 24, 1889, for the equal undivided three-fourths part of the said tract. Bridget E. Cheshire, the original grantor, by deed of bargain and sale dated November 23, 1889, conveyed the four lots to Sylvester J. Kenny in fee. He, by like deed of same date, conveyed to Frank M. McDermitt, who, by like deed dated November 30, 1889, conveyed the same to the defendant Charles A. Lehman. The bill alleges that, while the original deed from Bridget E. Cheshire to Michael R. Kenny in fact only conveyed a life-estate, the parties to it intended that it should convey an estate in fee simple, but by a clerical mistake, the word "heirs" was omitted from the granting and *habendum* clauses, of which omission both the grantor and grantee were ignorant, and

always supposed the deed conveyed an absolute estate of inheritance. It prays that the deed be reformed by inserting the word "heirs," so that an estate in fee-simple may be decreed to have passed thereby, in accordance with the intention of the parties; and that, after such reformation, the said land may be charged with liability for the payment of complainant's said judgment.

There can be no doubt that Bridget E. Cheshire sold and Michael R. Kenny bought the fee of the premises; and that they intended and supposed the original deed conveyed such an estate. That he so believed is shown by the fact that, three days after its date, he conveyed a portion of it in fee to the city of Newark, for the purpose of a street. Bridget E. Cheshire has been examined as a witness, and testified that, when she sold the property to Michael R. Kenny, and made a deed to him, she sold all her interest in the land to him — she "sold it out and out;" that she signed the second deed to Sylvester J. Kenny because she was told, by those who brought it to her, that a word was missing in the first deed, and that she never before knew there was a mistake in the first deed; that she was paid nothing for the last conveyance. It is clear that it was the intention of the parties to convey the fee, and that the omission of the word "inheritance" was not by the act or procurement, or with the knowledge of either of them, and that the deed did not accomplish the intentions of the parties through the mistake of the draughtsman. The satisfactory proof of these facts would warrant a decree that the deed should be reformed, if the proper parties were in court, and no interests have intervened which are entitled to prior protection. Kearney *v.* Macomb, 16 N. J Eq. 189; Weller *v.* Rolason, 17 N. J. Eq. 13; Wanner *v.* Sisson, 29 N. J. Eq. 141. Where it clearly appears that a deed, drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draughtsman, either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract. Wintermute's Ex'rs *v.* Snyder's Ex'rs, 3 N. J. Eq. 489–500; Hendrixson *v.* Irvins, 1 N. J. Eq. 562–568; Hopper *v.* Lutkins, 4 N. J. Eq. 149–154; Green *v.* Railroad Co., 12 N. J. Eq. 165; Hunt *v.* Rousmaniere, 1 Pet. 13; Higinbotham *v.* Burnet, 5 Johns. Ch. 183; Fisher *v.* Fields, 10 Johns. 495; Story Eq. Jur., § 115.

Is the complainant in a position to ask this court to make such a decree? He is a judgment creditor of Michael R. Kenny. During Kenny's life, and the continuance of the life-estate, that interest was subject to levy and sale under execution on the

judgment, but the interest which Kenny had in the fee was an equitable one only. Where words of inheritance are omitted by mistake from a conveyance, contrary to the intentions of the parties, a trust in fee may be considered as created, which a court of equity will execute, according to the conscience and intention of the parties. Higinbotham *v.* Burnet, 5 Johns. Ch. 184–188. Being an equitable interest only, the judgment and execution did not constitute a lien thereon. At Kenny's death, all that passed to his heirs was this equitable interest, not directly subject to the judgment of the complainant. Disborough *v.* Outcalt, 1 N. J. Eq. 298, 304; Woodruff *v.* Johnson, 8 N. J. Eq. 729; Halsted *v.* Davison, 10 N. J. Eq. 295. The judgment was, however, not a lien, and complainant was unable to enforce it against this property after Kenny's death, because the fee, by the mistake referred to, remained vested in Bridget Cheshire. Equity will intervene in behalf of a judgment creditor in pursuance of the statute, and as auxiliary to law, to remove a legal impediment which may be subject to some special branch of equity jurisdiction. Mr. Justice Depue, in Hardenburgh *v.* Blair, 30 N. J. Eq. 658, says: "The powers of the court were simply in aid of the judgment creditor when a trust had been interposed which obstructed the operation of the process of a court of law, and extended only to such property as, save for the interposition of the legal obstruction, might have been reached by such process." Neate *v.* Duke of Marlborough, 3 Mylne & C. 416. The chancellor, in Dinsborough *v.* Outcalt, 1 N. J. Eq. 298, says: "Courts of equity, in some cases, aid execution creditors, and obtain satisfaction of their demands. But, to warrant its interference, there must be some equitable ground presented. The case must be infected with fraud, or it must involve some trust or other matter of peculiar equity jurisdiction. The court will then act on its own established principles, and afford such relief as the situation of the parties requires and the nature of the case will admit."

If the condition of the title to the premises in question had been created by Michael R. Kenny intentionally, and for the purpose of defrauding his creditors, equity would, in the exercise of its jurisdiction to prevent fraud, have lent its aid to remove the impediment. In such a case, the defendant, by his own act, so places the title that it cannot be reached by his creditors. This is, of course, a fraud as to them. Having obtained a judgment, the creditor is prevented from reaching the property by execution by the impediment thus interposed by the fraud of his debtor, and the prevention of the successful perpetration of fraud being one of the grounds of equity jurisdiction, the

court will exercise it to remove the obstacle, and aid the judgment creditor in the collection of his claim. The element of fraud was wanting in the case of Disborough *v.* Outcalt, *supra*, and for that reason the court withheld its arm. In Woodruff *v.* Johnson, *supra*, the court proceeded against the property which represented the defendant's expenditure, on the ground that it would be a fraud to permit him to so secure his own individual property from his creditors. But the correction of a mistake, where it has occurred under certain conditions, is also a branch of equity jurisdiction. The mistake in the case in hand is one which falls within the rules which invoke the exercise of that power. An impediment to the collection of the debt of a judgment creditor by execution is created, not by the fraud, but by such a mistake of the parties. While I find no case similar, it is clear, on principle, that the power of the court should be exercised to remove an obstacle to the operation of the execution created by such mistake, as well as the case of fraud, and that the complainant would be entitled to the aid of the court, if the rights of others which have been acquired do not deprive him of its exercise.

The legal title being in the defendant Lehman, the question presents itself, is the equity of the complainant superior to the rights which are vested in Lehman, and this depends on whether Lehman was a *bona fide* purchaser for value of the property. The evidence shows that the value of the property was about $1,000, and that it was subject to the lien of taxes under the Martin act to the amount of $350. The interest of the defendant Lehman was acquired under the following circumstances: Horace J. Kenny, a son of Michael R. Kenny, boarded with the defendant Lehman, and became indebted to him in the sum of $205. Lehman refusing to trust him further, Horace procured from his sister, Mrs. Flintoff, her note for $225, which he paid to Lehman in discharge of his debt, receiving the balance in cash. Horace J. Kenny had been sued by a Mr. Colie, in settlement of which the defendant McDermitt gave his own note for $100. McDermitt had also loaned money to Horace at various times, and took the conveyance from the Kenny heirs to secure this indebtedness. Lehman claims to have advanced Horace $25 on the strength of McDermitt having this deed. McDermitt then had a search of the title made, and discovered that the original deed only conveyed a life-estate to Michael, and told Lehman not to give Horace any more money, because there was something the matter with the title. On McDermitt informing Horace of the defect in the title, the second deed was procured from Mrs. Cheshire to Sylvester J. Kenny. McDermitt says

he knew absolutely nothing as to how Sylvester obtained that deed, or the circumstances under which he obtained it. After Sylvester conveyed to Mr. McDermitt, the latter told Horace, if he would agree to discharge his indebtedness to Lehman, as the title was now clear, he thought he could induce Lehman to buy the property so that Horace could pay his debts and get some cash. McDermitt says he acted for Horace in the matter; that he told Lehman he could give him a good, clear title; that Lehman had no notice of any judgment; no notice of any lien; that he did not consider it necessary to give him any notice of any such judgment, because he did not regard it as a lien against the property. McDermitt negotiated a sale of the lots to Lehman, and conveyed them to him by the deed dated November 30, 1889. Lehman, in pursuance of his agreement, and as consideration for the conveyance, gave up the $225, Flintoff's note, paid Horace $100 on receiving the deed, and, in a day or so, settled the balance by discharging his indebtedness, and paying him some $200 in cash. He assumed the payment of taxes amounting to $350, and the Colie note of $100. So that he gave up a note of $225, paid Horace $300, and canceled Horace's indebtedness, including a loan of $25. He has since given Colie his own note for $100, and has paid the taxes; the whole being the value of the property as sworn to by McDermitt, and not questioned.

The complainant claims that Lehman was not a *bona fide* purchaser, and should be postponed to his judgment, because he is chargeable with notice of complainant's claim. The evidence is that Lehman's deed was delivered prior to any actual notice of any claim on the part of complainant. It is urged that McDermitt was Lehman's counsel, and that the latter is chargeable with such notice as McDermitt had. They both deny that McDermitt was Lehman's counsel in the matter, and the evidence fails to establish the relation of counsel and client between them as to this transaction. But, if it were as contended, McDermitt only had notice of what he had learned from the record, and Lehman was bound to have advised himself of the condition of the title as shown by the record. Mr. Justice Dixon, in Roll *v.* Lea, 50 N. J. Law, 268; 12 Atl. Rep. 905, says: "A party is undoubtedly chargeable with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derived his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals of those instruments made it his duty to pursue." And again: "Parties dealing with real estate may always lawfully assume that the title is com-

pletely disclosed on the records, unless there is some circumstances of which they are bound to take notice, which would apprise a reasonable man, not merely that the records may be defective, for that is always possible, but that they actually are so in the particular case in hand." Complainant's equity was based on the fact that the conveyance from Bridget Cheshire to Michael R. Kenny was intended by the parties to convey the fee, but by mistake of the draughtsman only conveyed a life-estate. What notice of this condition could be developed by an examination of the records? The record disclosed the complainant's judgment, and that Michael R. Kenny had only a life-estate in the property; but the creation of a life-estate is certainly not such a peculiar fact as to require a prudent man to inquire into its reason, or the circumstances connected with its creation. Much is claimed, as a warning, from the fact that on the record a blank occurs where the word "heirs" would be properly written, but the existence of such blank would, to most minds, indicate that the word was properly omitted, rather than that its omission was the result of carelessness or mistake. It is urged that the deed from Michael R. Kenny to the city of Newark in fee of a strip of the land was a circumstance showing that he considered his title complete; but, when the conveyances to McDermitt and Lehman were made, Michael R. Kenny was dead, and the conveyance to him, being only for a life-estate, which was of course terminated by his death, what he had done during the term of his life-estate could not affect the title after its termination, and there was no reason to search for what he had done during its existence. So that all the notice Lehman is chargeable with was the conveyance of a life-estate by Bridget Cheshire to Michael R. Kenny, the entry of the complainant's judgment, the conveyance to Sylvester J. Kenny, and that to Frank M. McDermitt. This is far short of complainant's case, that the original conveyance was intended by the parties as one in fee which had been defeated by mistake of the draughtsman. But complainant is chargeable with notice of everything that Lehman is. The record was as much notice to him as to the defendant. He has slept on his rights since April, 1878. All of the events or conveyances which he now claims should have opened the eyes of Lehman to the fact that his judgment should, in equity, be enforced against this property, existed, and were as apparent then as now. *Vigilantibus non dormientibus equitas subvenit.* These considerations lead to the conclusion that complainant has no equity which is superior to Lehman's title, and that the bill must be dismissed. The conveyance to Sylvester J. Kenny may have inured to the benefit of the infant defend-

ants, but their rights cannot be adjudicated in this suit, if the complainant's case fails.

Words of Limitation in Deed to Trustees.

Ewing *v.* Shannahan, 113 Mo. 188; 20 S. W. 1065.

BLACK, J. This is an action of ejectment for a lot in the city of St. Louis. The answer is a general denial, and a plea of the statute of limitations. Both parties claim under William G. Ewing. The plaintiff put in evidence a deed, the material parts of which are in these words: "This indenture witnesseth that George W. Ewing, Junior, a devisee of William G. Ewing, * * * in consideration of six hundred dollars and other good and sufficient consideration, doth by these presents give, grant, bargain and sell to George W. Ewing, father of George W. Ewing, Junior, the following described real estate, [then follows a description of the lot in question, and other lots and lands in this State and in the States of Indiana, Illinois, and Minnesota,] to have and to hold the same to the said George W. Ewing, in trust, for the uses and purposes following, to wit: *First.* The said George W. Ewing, trustee as aforesaid, shall sell and convey all such part or parts of the real estate hereby conveyed to him as he may deem most advantageous for the interests of the trust hereby created, and the proceeds thereof to reinvest for the same purpose for which this trust is created, or to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable, and for the purpose of creating an income therefrom. *Second.* That of the income and profits arising under this trust, a reasonable sum, such as the said trustee shall deem to be sufficient, shall be expended in the maintenance of the said George W. Ewing, Jr., and the necessary expenses shall be expended, for the benefit of the trust, when and at such times as the trustee shall think best. *Third.* Should the said trustee die before his said ward, that Jesse Holliday, of San Francisco, Cal., or, upon his refusal to act, such person as the court of common pleas of Allen County, Indiana, shall appoint, shall take up and continue this trust. *Fourth.* That upon the death of the said George W. Ewing, Jr., the property hereby placed in trust shall descend to the legal representatives of the said George W. Ewing, Jr.; provided, however, that William G. Ewing, Jr., the adopted son of William G. Ewing, deceased, shall under no circumstances whatever inherit or be entitled to any part or parcel hereof." This deed bears date the 31st December, 1863; and on the 1st

March, 1866, George W. Ewing, Sr., executed to George W. Ewing, Jr., a quit-claim deed of that date. This quit-claim deed refers to the deed of trust, and then states that it is now desirable that the trust be terminated, and to that end the unsold property described in the deed of trust is conveyed back to the donor. Afterward, and on the 15th July, 1867, George W. Ewing, Jr., and his wife, by their warranty deed, conveyed this lot to the defendant for the consideration of $1,800, that being its then full value. Defendant took possession under this deed, and has made improvements on the property at a cost of $20,000, believing he had a perfect title. George W. Ewing, Jr., died on the 2d December, 1872, leaving a son, the plaintiff in this case, as his only heir at law. Plaintiff was born on the 6th September, 1866. This suit was commenced on the 13th March, 1889. On a trial without a jury the circuit court gave judgment for defendant.

1. Although the deed from George W. Ewing, Jr., conveying the property to his father, George W. Ewing, Sr., in trust, does not use the word "heirs," still the deed vested in the trustee the fee-simple title for the purposes specified; for under our statute the word "heirs," or other words of inheritance, are not necessary to convey an estate in fee-simple. Such an estate passes by the deed without the use of words of inheritance, unless the intent to pass a less estate is expressly stated, or appears by necessary implication. Section 3939, Rev. St. 1879; McCullock *v.* Holmes (Mo.), 19 S. W. Rep. 1096 (not yet officially reported). Here no intent to pass a less estate appears.

But, without regard to this statute, the deed in question would pass a fee-simple estate to the trustee; for though, in general, in the absence of such a statute, words of inheritance are necessary to pass a fee, yet there are exceptions to the rule. Thus, where lands are devised or conveyed to a trustee without the use of the word "heirs," and it is necessary that the trustee should take an estate of inheritance in order to enable him to carry out the intention of the donor, he will take an estate in fee-simple. Perry Trusts, § 315; Fisher *v.* Fields, 10 Johns. 495; Cleveland *v.* Hallett, 6 Cush. 403. Where, as in the case now in hand, the property is conveyed to a trustee with power to sell and convey the fee simple, an estate in fee simple is invested in the trustee. North *v.* Philbrook, 34 Me. 533; Neilson *v.* Lagow, 12 How. 99; Gould *v.* Lamb, 11 Metc. (Mass.) 84. If, however, a less estate than a fee is clearly given, courts cannot enlarge it by construction; but here no intention is manifested to give a less estate.

2. A further preliminary question arises, and that is what

meaning is to be given to the term "legal representatives" in the fourth of the paragraphs specifying the trusts, whereby it is provided that upon the death of the said George W. Ewing, Jr., the donor, the property placed in the hands of the trustees shall descend to the legal representatives of him, the said donor. The term "legal representatives" is often used in statutes and instruments of writing in a broad sense, so as to include all persons who stand in the place of, and represent the interest of, another, either by his act or by operation of law, and in such cases it includes heirs and assigns. Wear *v.* Bryant, 5 Mo. 147; Insurance Co. *v.* Armstrong, 117 U. S. 597; 6 Sup. Ct. Rep. 877; Beall *v.* Elder, 34 La. Ann. 1098; Johnson *v.* Ames, 11 Pick. 173. But the usual and ordinary meaning is "executors and administrators." Cox *v.* Curwen, 118 Mass. 198; Lodge *v.* Weld, 139 Mass. 499; 2 N. E. Rep. 95; Bowman *v.* Long, 89 Ill. 20; Hasley *v.* Paterson, 37 N. J. 448. The term may, and often does, mean heirs (Bowman *v.* Long, *supra;* Farnam *v.* Farnam, 53 Conn. 290; 2 Atl. Rep. 325, and 5 Atl. Rep. 682), or next of kin (Jennings *v.* Gallimore, 3 Ves. Jr. 146). Sufficient has been said to show that we must look to the context to ascertain the meaning of the term, as used in this deed. Doing this, we find the donor of the trust reserved no power to dispose of the property, or any interest therein. He has not even reserved the power of revoking the trust. It cannot, therefore, be said, that the words "legal representatives" mean, or even include, assigns, or persons succeeding by any act of his; for he is shorn of all power to create a successor by assignment, deed, or otherwise. This being so, the words cannot mean or include assigns or grantees. The creditor of the trust is here speaking of lands, — of real estate, — and says that upon his death the property shall descend to his legal representatives; and he then goes on to say that the adopted son of William G. Ewing shall in no event inherit or be entitled to any part of the property. The evident and manifest meaning of the trust as declared is that upon the death of the donor the remaining property shall pass to, and become the property of, those persons upon whom the law would cast the property, had the donor died seised of it. The term, therefore, means heirs, as here used.

3. The question then arises whether the quitclaim deed from the trustee back to George W. Ewing, Jr., the donor, had the effect to revoke the trust. That such was its object is clear, for the deed so declares. As preliminary to the disposition of this question, it is to be observed that the trust is well and properly declared, and that, too, in the most formal way; for the deed of trust conveys a fee simple to the trustee, and then specifies

the purposes for which the trustee takes and holds the property. There is here a perfect, completed, executed trust, and, this being so, it is immaterial whether the trust is to be deemed a voluntary one, or made upon a valuable consideration; for, being a perfect and completed trust, it must be enforced in either event. Leeper *v.* Taylor (Mo. Sup.), 19 S. W. Rep. 955. The trusts declared are to sell and convey as the trustee shall deem best; to reinvest the proceeds on the same trusts, or apply them in improving the other property; to apply the income and profits to the extent that the trustee shall deem sufficient to the maintenance of the donor. At his death the active trust ceases, and the property passes to those persons who answer the description of heirs of the donor. It must follow that such persons are beneficiaries of the trust, as well as the donor himself. No power of revocation is reserved by the donor.

Now, a completed trust, without reservation of power of revocation can only be revoked by the consent of all of the beneficiaries. Says Perry, "A trust once created and accepted, without reservation of power, can only be revoked by the full consent of all parties in interest. If any of the parties are not in being, or are not *sui juris*, it cannot be revoked at all." Perry Trusts (4th Ed.), § 104. Applying this principle, it must be held that the quitclaim deed did not revoke the trust. As to the plaintiff it was and is a nullity. Indeed it has been held by the Supreme Court of Indiana and of Minnesota that the very quitclaim deed now in question did not terminate or destroy the trust, and that it was out of the power of the trustee or donor, or both combined, to revoke or destroy the trust. Ewing *v.* Warner, 47 Minn. 446; 50 N. W. Rep. 603; Ewing *v.* Jones (Ind. Sup.), 29 N. E. Rep. 1057.

4. It follows from what has been said that the plaintiff is entitled to recover, unless barred by the statute of limitations; and this presents the most difficult question in this case, The trust, it will be remembered, was created by the deed of George W. Ewing, Jr., to George W. Ewing, Sr., dated the 31st December, 1863; and the attempted deed of revocation bears date March 1, 1866. The trustee died in May of that year, and the plaintiff was born 6th of September of the same year. George W. Ewing, Jr., the creator of the trust, conveyed this lot to the defendant 15th July, 1867, and died in December, 1872. This suit was commenced 13th September, 1880, two years and a few days after the plaintiff attained the age of 21. No right of entry accrued to the plaintiff until the death of his father, which was in 1872. He was at that time a minor; and, as he brought this action

within three years after the removal of the disability of infancy, he is not barred, unless he is barred because an action by the trustee would be barred. While there was some doubt at one time, the law is now well settled, both in England and in this country, that the rule that the statute of limitations does not bar a trust estate holds only as between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on the one side, and strangers on the other side. Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. Where the trustee is barred, so is the *cestui*. 2 Perry Trusts (4th Ed.), § 858; Hill Trustees (4th Amer. Ed.), pp. 413, 441; Herndon *v.* Pratt, 6 Jones Eq. 327; Clayton *v.* Cagle, 97 N. C. 300; 1 S. E. Rep. 523; Woolridge *v.* Bart, 1 Sneed, 297; Merriam *v.* Hassam, 14 Allen, 516; Smilie *v.* Biffle, 2 Pa. St. 52. Perry says, in the section just mentioned: "But it would seem that, if the *cestui que trust* is entitled to an interest in remainder only, the statutory bar ought not to begin to run against him until his interest falls into a right to the possession of the beneficial or equitable interest," — citing Parker *v.* Hall, 2 Head, 641. Hill says it seems somewhat doubtful how far the infancy of the *cestui que trust* will prevent the adverse possession of a stranger from operating as a bar to their claims, but he seems to think the true doctrine of the English courts is that a fine and nonclaim should bar the *cestui que trust*, though an infant. Wood says: "When the legal title of property is vested in a trustee, who can sue for it, and fails to do so within the statutory period, an infant *cestui*, who has only an equitable interest, will also be barred; but the rule is otherwise when the legal title is vested in the infant, or cast upon him by operation of law." Wood Lim. Act, § 208. These extracts from the text-books disclose a want of any well-defined rule, and it is deemed best to examine the cases themselves. In Parker *v.* Hall, *supra*, a guardian of minor children purchased certain slaves with the money of his wards, and took a bill of sale in his own name as such guardian, which was duly registered. He sold the slaves while his wards were yet minors, and died insolvent. Thereafter the wards, one being then a minor, filed a bill against the purchaser for possession of the slaves. The court held that the rule that when the trustee is barred all the beneficiaries are also barred did not apply, because the trustee, the holder of the legal estate, had estopped himself from suing by making a bill of sale to the purchaser, and because he had united with the purchaser in a breach of the trust; and the same court held that where the trustee took but a life estate the statute of limitations would not

run, as against the remainder-men, until the death of the life tenant. Belote *v.* White, 2 Head, 703. But in Williams *v.* Otley, 8 Humph. 563, it was said: "Whenever a trustee, having the legal title, neglects to sue till he is barred by the statute of limitations, the *cestui que trust* is likewise barred though an infant under twenty-one years of age." In Bull *v.* Walker, 71 Ga. 195, the will gave to Susan P. Howard certain real estate for her benefit for life, and then to her children, and then appointed a trustee to take and hold the property for her. It was held the statute of limitations did not begin to run against the children until the death of their mother, the life tenant; but it was also held that the trustee was simply a trustee for the life tenant, and that his only duty was to protect the life estate from sale for debts of the life tenant. Gudgell *v.* Tydings (Ky.), 10 S. W. Rep. 466, to which we are cited by the plaintiff, is not essentially different from the case last mentioned. But in Wingfield *v.* Virginia, 51 Ga. 139, the title was vested in a trustee, and it was held that, the trustee being barred, the beneficiaries, though infants, were barred. The facts of that case were these: Weems and wife executed a deed conveying the land to Wingfield in trust for certain purposes, one of which was to hold the same for the sole benefit of the wife of Weems and her children, born and to be born; the income to be applied to the support of the family, and not subject to the debts of Weems. The trustee and Weems and wife executed deeds conveying the property to Wylie, who took and held possession. The children of Weems and wife, being still minors, filed a bill against those claiming under Wylie, to re-establish the trust; and the defendant set up, among other things, the statute of limitations. The court said: "The distinction is this: When the legal title to the property is vested in a trustee, who can sue for it, and fails to do so within the time prescribed by law, and his right of action is barred, the infant *cestui que trustent*, who have only an equitable interest in the property, will be also barred; but when the legal title to the property is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. In the case before us the legal title to the property in controversy was never in complainants, and could not be until the death of Weems, their father, and therefore Wylie's title by prescription was good as against Wingfield, the trustee, who had the legal title to the property; and, he being barred from recovering the possession of it, the complainants, his infant *cestui que trustent*, are also barred." That court has held in a number of cases that where the title to land was in a trustee, and he failed to sue

until his right of action was barred, the beneficiaries were barred, though infants. Brady *v.* Walters, 55 Ga. 29; Knorr *v.* Raymond, 73 Ga. 749, and cases cited. In Molton *v.* Henderson, 62 Ala. 426, lands were devised to trustees to hold for the benefit of a *non compos.* The lands were sold, by order of a probate court, at the instance of a guardian of the *non compos*, who filed a bill, by his next friend, to subject the land to the trust created by the will. The court held that the guardian's sale was void, but that the purchaser acquired color of title. After stating the general rule to be that, if a trustee delays the assertion of his rights until the statute effects a bar against him, the *cestui que trust* will also be barred, and after reviewing various cases, the court says: "On principle and authority, therefore, we must say the fact that the appellee was *non compos mentis*, and yet so remains, cannot prevent the operation of the general rule to which we have referred. If his trustees have been negligent in asserting the legal title the law affords him remedies against them, which are without the operation of the statutes. These remedies, if he has been wronged, he must pursue." In the case now in hand, the plaintiff took an equitable contingent remainder by force and effect of the deed of trust. Until the death of the donor, the entire legal title, a title in fee simple, was vested in the trustee. It was the duty of the trustee to protect the title for those who should take upon the death of the donor as well as for the donor during his life. To this end the entire legal title was vested in the trustee, and the right of possession was in him. As the trustee held the legal fee-simple title, and the right of possession for all of the beneficiaries, he was the proper person to sue for possession; and we think the case comes within the rule that where the trustee is barred by lapse of time the beneficiaries are also barred, and that, too, though the beneficiaries are minors. That which bars the legal title here bars the equitable title. The acceptance of a trust like this is not a meaningless affair, and if the trustee has made breach of the trust, and wronged the plaintiff, the remedy is against the trustee. The statute of limitations is one of repose, and should be applied in this case.

It is true the trustee died before George W. Ewing, Jr., executed the deed to the defendant; and it does not appear that Jesse Holliday ever accepted the trust, or that a new trustee was ever appointed by the court, as provided in the third clause of the deed of trust. But the legal title passed to the heirs of the trustee, and it does not appear that they were laboring under any disability. It became their duty to care for the property, or have a new trustee appointed. Our conclusion is that the

statute began to run against both the legal and equitable title when defendant took possession; that the legal and equitable titles were both barred by ten years' adverse possession, and this, too, though the owner of the equitable title was, during all that time, an infant. That defendant's possession has been adverse, and that, too, for a period of 20 years, cannot be questioned.

It is suggested that defendant purchased with knowledge of the trust, because the trust deed was recorded; and that he did purchase with constructive notice must be conceded. The fact, however, that he had such notice, did not prevent the statute of limitations from running. If that were so, the statute would cease to be one of repose. The statute will run in favor of even a wrong-doer. There can be no claim that defendant was guilty of any fraud. On the contrary, the proof shows, beyond all doubt, that he paid full value for the property, believing he had acquired a perfect title, and with that belief made improvements thereon to the amount of $20,000.

The judgment is affirmed.

Words of Limitation in Will — Held to Be a Life Estate and Not a Fee.

Siddons *v.* Cockrell, 131 Ill. 653; 23 N. E. 586.

Scholfield, J. The second clause of the last will and testament of William Y. Hervey reads as follows: "I will, devise, and bequeath to my beloved wife, Nancy Martha, during and so long as she remains my widow, the net use and control of all the real estate and personal property of which I may die seised, wherever the same may be situated or found, for the support of herself and my children. Should she marry, from and after such marriage she shall have and control only one-third in value of the real estate, and one-third of the personal property then remaining, absolute. Should she survive all my children, they having died without issue, I will, devise, and bequeath all my real estate and personal property to be hers, her heirs and assigns, forever. But in case of the death of my wife, leaving any of my children surviving, I will, devise and bequeath to them all of my estate in equal proportions, share and share alike; the heirs of any of my children taking their deceased parents share. The personal property I devise in the same manner I have devised the real estate, and subject to the same order of distribution." The testator was the owner of several

hundred acres of valuable lands, and of a large amount of personal property, at the time of his death. His widow named in the will, and six children, survived him. After the death of the testator the widow married again. One of the children died in infancy, and before the subsequent marriage of the widow. Another one of the children married, had a child, who is still living, born to her, and after the birth of such child, and the subsequent marriage of the widow, conveyed to another her interest in the testator's real estate, and thereafter died intestate. The other children are still living.

The questions before the court below were: (1.) Does the widow take, a fee or a life-estate, after her marriage, in the one-third then given her in the real estate? (2.) Was a fee vested in the children which could pass by descent immediately upon the death of the testator? The court below found that the widow took a life-estate only in one-third of the real estate, after her marriage, and that a fee was vested in the children immediately upon the testator's death, which passed, upon the death of the child dying in infancy, and before the subsequent marriage of the widow, to the heirs at law of such child. The appellant contests the first of these rulings; and these appellees who are children of the testator contest the last. The other appellees insist upon the correctness of both rulings.

1. Counsel for appellant argue that by the use of the words "from and after such marriage she shall have and control only one-third in value of the real estate and one-third of the personal property then remaining, absolute," the testator clearly intended to vest a fee in the real estate in his widow; that "have" means ownership: "from and after," being unlimited or qualified by other words, mean "thenceforth forever;" and that "absolute" refers to both the real and the personal estate, and, applied to the real estate, means a fee-simple, in contradistinction to a life-estate. If nothing but these words were to be considered in connection with the devises, there would be much force in the argument. But the familiar rules of construing wills require, if it can be necessarily given, such a construction as shall give force and effect to every word and clause, and if a prior and a subsequent clause are repugnant, that the prior clause shall be strained or modified by the subsequent clause. Walker *v.* Pritchard, 121 Ill. 221; 12 N. E. Rep. 339. It will be observed that, in clauses subsequent to that referred to and relied upon by the counsel, the testator assumes to devise all of his real estate in fee to his children or to his widow. It is, of course, impossible to give one-third of his real estate in fee to his wife, and all of his real estate in fee to his children; and yet the word

"all," in this connection, is unqualified, expressly or impliedly, by any modifying word. But a devise of land, without the use of the word "heirs," or other words necessary at common law to pass a fee, is only to be construed as a devise of a fee when it does not appear from the entire will that a less estate was intended (Walker *v.* Pritchard, *supra*); and since it could not have been intended to devise by the subsequent clause what was devised by the prior clause, and the language of the subsequent clause has preference in determining what is devised by that clause, it must have been intended by the first clause to devise a life-estate, as between a devise of which, and of a fee in the same land, there is no necessary repugnance. It will also be further observed that the testator in the first clause uses the language, "she shall have and control," but in the subsequent clause he uses the language "devise and bequeath all my real estate, * * * to be hers, her heirs and assigns, forever." This change of phraseology plainly shows that what was intended by the latter was different from that intended by the former, and that the testator knew, and had in his mind at the time, what language to use to devise a fee so that this meaning could not be misunderstood. The meaning of the word "absolute," in the connection in which it occurs, in our opinion, has reference to the personal property only, and was not intended to be descriptive of the real estate.

The widow might, had she so elected, have renounced under the will, and have taken the interest in the testator's estate that she would have taken had he died intestate, namely, dower in the lands (section 1, c. 41, Rev. St. 1874), and, "as her absolute personal estate, one-third of all the personal estate" (clause 4, § 1, c. 39, Rev. St. 1874). And it is fairly to be inferred that the testator intended that if his widow married again she should have only what she would have taken under the law if he had made no will, or what she would have taken under the law by renouncing under his will and in spite of his will. Such provisions are presumably intended to discourage rather than to invite subsequent marriages; and it would therefore be unreasonable to assume that the word "absolute" was here intended to express the idea of a conveyance of real estate in fee so long as any other rational meaning can be assigned to it.

There is another view that we think might well be taken of the intention in using that word. The use and control given of the property devised before subsequent marriage is expressed to be for the support of the widow and the testator's children, but the property given to her afterwards is for herself alone; and so the

word "absolute" may reasonably be held to express that idea — the unrestricted, *i. e.*, absolute, use by the widow, for herself, in contradistinction to the former joint use, for herself and the testator's children. The words "from and after" imply futurity, "indefinitely," simply, and are clearly restricted by the purpose of the devise as manifested by the entire will.

2. In the absence of a clearly manifested intention to the contrary, it must be presumed that the testator intended to dispose of all of his estate. So, also, the heir at law is not to be disinherited unless the intent to do so is very clearly expressed. 1 Redf. Wills, § 18, p. 434. The devise of the use and control of the real estate being in effect a devise of the real estate itself, the devise in the first instance was of a life-estate, determinable, however, as to two-thirds thereof, upon the subsequent marriage of the widow (1 Prest. Est. 442); and there was a reversion still left in the testator to be devised (Tied. Real Prop., § 386; State *v.* Brown, 27 N. J. Law, 20; McKelway *v.* Seymour, 29 N. J. Law, 329). The devise of the reversion in the two-thirds of the real estate, in the event of the subsequent marriage of the widow, would therefore have to take effect immediately upon such marriage; and we must assume that the testator intended that it should then take effect. But there is nothing in the language of the will that warrants the conclusion that the title devised was intended to be vested at different times, although the enjoyment of one-third of the estate is postponed until after the death of the widow. The will should therefore be read as follows, after the devise to the widow: "I devise all my remaining real and personal estate to my children; and if any children be dead, leaving children surviving them, then to them, also, the children of a deceased child taking the part of their parent. But if all my children shall die, without issue, before my wife shall die, I devise the same to her." The estate devised is clearly intended to be a fee-simple in whomsoever shall take. The title was intended to vest immediately upon the death of the testator, and so, necessarily, he must have intended children or children's children in being at his death; and the deaths contemplated were necessarily deaths in the lifetime of the testator. Briggs *v.* Shaw, 9 Allen, 516; Fulton *v.* Fulton, 2 Grant Cas. 28; Moore *v.* Lyons, 25 Wend. 119; Freeman *v.* Coit, 96 N. Y. 68. We find no error in the record. The judgment is affirmed.

CHAPTER IV.

ESTATES TAIL.

Lehndorf *v.* Cope, 122 Ill. 317; 13 N. E. 505.
Wheart *v.* Cruiser, 49 N. J. L. 475; 13 A. 36.

Limitation of an Estate Tail Special.

Lehndorf *v.* Cope, 122 Ill. 317; 13 N. E. 505.

SHOPE, J. It is contended by appellee that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf," Mrs. Lehndorf took a fee-simple estate in the lands conveyed; while appellants contend that she thereby took a life-estate only, with remainder in fee to her children by said Henry Lehndorf. The deed, being statutory in form, contains no *habendum* limiting or defining the estate taken by Mrs. Lehndorf; and although the deed must be held equivalent to one containing full covenants (Elder *v.* Derby, 98 Ill. 228), it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they may be. If Mrs. Lehndorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life-estate, and the remainder in fee to whoever would take upon determination of her estate. Therefore, as said by counsel for appellees, the determination of the question depends upon a construction of the granting clause of the deed, which is that the grantors, in consideration, etc., "convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf, of," etc., the lands in controversy.

The legitimate purpose of all construction of a contract or other instrument in writing is to ascertain the intention of the party or parties in making the same; and, when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed; but it is the intention apparent and manifest in the instrument, construing each clause, word, and term involved in the construction according to its legal import, and giving to each, thus construed, its legal effect. 3 Washb. Real Prop. 404; Bond *v.* Fay, 12 Allen, 88; Lippett *v.* Kelley, 46 Vt. 516; Price *v.* Sisson, 13 N. J. Eq. 169, 178;

Caldwell *v.* Fulton, 31 Pa. St. 489; Wager *v.* Wager, 1 Serg. & R. 374. It cannot be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first notice the contention of counsel for appellee that, by virtue of section 13 of the conveyance act (as there is here no express limitation upon the estate of Mrs. Lehndorf, and as no one can have heirs while living), the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows: "Sec. 13. Every estate in lands which shall be granted, conveyed, or devised, although other works heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." It is not necessary, as seems to be supposed, that, to create a less estate than the fee, there should be express words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear by necessary implication that a less estate was granted.

In an early case (Frogmorton *v.* Wharrey, 2 W. Bl. 728), where there was a surrender of copyholds by R., who was seised in fee, to M., his then intended wife, and the heirs of their two bodies, etc., Wilmot, C. J., delivering the opinion of the court for himself, Bathurst, Gould, and Blackstone, JJ., after holding on authority of Gossage *v.* Tayler, Style, 325, and Lane *v.* Pannell, 1 Rolle, 438, that the children thus begotten took as purchasers, and not as heirs, says the only difference in the cases is that in those cases "the wife had an express estate for life, and here not. But upon legal principle the cases are just alike. An estate 'to A. and the heirs of his body, is the same as an estate 'to A. for life, remainder to the heirs of his body.'" By operation of law, the added words created, in the case cited in M. a life-estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A. and the

heirs of his body," by operation of law, creates an estate-tail in A.; remainder in tail. And this has been the uniform holding. The sixth section of the conveyance act provides that in cases where, by the common law, any person or persons might, after its passage, become seised in fee-tail of any lands, etc., by virtue of any gift, devise, grant, or conveyance "hereafter to be made," or by any other means whatsoever, such person or persons, instead of being or becoming seised thereof in fee-tail, shall be deemed and adjudged to be and become seised thereof for his natural life only, and the remainder shall pass, in fee-simple absolute, to the person or persons to whom the estate-tail would on the death of the first grantee or donee, pass according to the course of the common law, by virtue of such gift, devise, or conveyance.

It is apparent if, at common law, by virtue of this conveyance, Mrs. Lehndorf would take an estate-tail, whether an estate-tail general or an estate-tail special, the thirteenth section would be inoperative, and by virtue of section 6 she would become seised of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estates-tail came into general use upon construction by the courts of the statute *de donis conditionalibus* (13 Edw. I. *c.* 1); and, while no extended discussion will be necessary, an examination sufficient to determine if this case falls within the rules creating an estate-tail will be proper. To create an estate in fee-simple at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation in the regular course of descent. A tenant in fee-simple is defined by Blackstone to be "he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely, simply; without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law." 2 Bl. Comm. 104. Estates in fee-tail were of two kinds: Estates-tail general, as where the grant was to one, and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni;* and estates-tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. 2 Bl. Comm. 113, 114; 4 Kent Comm. 11; 1 Washb. Real Prop. *66. In a grant of lands, words of inheritance were necessary at common law to the creation of a fee; but in the creation of a fee-tail estate more was required. There must also be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the

grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A." But there was no special efficiency in these particular forms of words, and it was requisite only that, in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. 2 Bl. Comm. 114; 1 Washb. Real. Prop. *72; 2 Prest. Est. 478, and cases cited; 2 Jarm. Wills, 325.

The necessary words of inheritance are not here wanting to create a fee-simple or a fee-tail at common law. The grant is to Mrs. Lehndorf and her heirs, and, if the description had stopped here, a fee-simple estate would at common law have passed by the deed. The grant is not, however, to her and her heirs *simpliciter*, but to her and her heirs by a particular husband, and by necessary implication excludes the construction that heirs generally were intended. Heirs generally would include, not only those designated, but children she may have, or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so that it would have read "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that the equivalent words, which by necessary implication describe and designate the particular body out of which the heirs should proceed, would suffice to create an estate-tail at common law, which seems to be done by the cases and text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband" could be no other than the issue of her body by him begotten; no other person or class of persons would answer the description, and they would and do fill it in every particular.

This precise point was ruled in Wright *v.* Vernon, 1 Drew. 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Sanwell by a particular wife forever,' is precisely the same as that of a limitation to the heirs of his body by that particular wife forever. The words 'of his body' are not in the least degree necessary to this construction of the term 'heirs' or 'right heirs,' because, without their insertion, the full and absolute effect of them is involved in the description, 'his right heirs by Mary, his second wife;' which description limits the meaning of the term 'heirs' to heirs special, procreated by himself, as effectually and as necessarily as the words 'of his body,' could do if they had been added."

This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows that Mrs. Lehndorf would, at common law, be seised, by virtue of this conveyance, of an estate-tail special in the lands conveyed, and therefore, under the statute, would take an estate for her life only; and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband *in esse* at the time of making the deed, — subject, possibly, however, to be opened to let in after-born children of the same class. If no issue of her body "by her present husband" had been then living, the remainder would have fallen under Fearne's fourth and Blackstone's first definition of a contingent remainder; *i. e.*, when the remainder is limited "to a dubious and uncertain person." But here, at least two of the children who would, under the statute, take the fee-simple estate upon the termination of the life-estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the possible contingency of being divested *pro tanto*, if opened to let in after-born children answering the same description. The person to whom the remainder is limited is ascertained; the event upon which it is to take effect is certain to happen; and, although it may be defeated by the death of such person before the determination of the particular estate, it is a vested remainder. "It is the uncertainty of the right of enjoyment which renders a remainder contingent; not the uncertainty of its actual enjoyment." Bl. Comm. *i i*, 169; Fearne Rem. 149; 4 Kent Comm. 203; Hawley *v.* James, 5 Paige, 467; Williamson *v.* Field, 2 Sandf. Ch. 533; Moore *v.* Lyons, 15 Wend. 144.

But it is said that the rule in Shelley's Case should be applied; but it will be seen that its application will produce the same result. That rule, as formulated by Jarman in his work on Wills, p. 331, will best illustrate the position here. It is: "The rule simply is: that where an estate of freehold is limited to a person and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple." The rule operates upon the words of inheritance without affecting the words of procreation; so that if in any case the words "heirs of his body" or other

equivalents sufficient to create an estate-tail, are used, a fee-tail is vested in the first taker, and not the fee-simple, as seems to be supposed. Therefore, if the rule be applied, Mrs. Lehndorf would at common law be seised of an estate in fee-tail, and brought directly within the terms of section 6 of the conveyance act before cited. When, therefore, Mrs. Lehndorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee; and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.

But it is said this mortgage was given for the purchase money of the land, and that in some way, not clearly defined in argument, a lien therefor exists upon the estate conveyed. If it is intended thereby to insist that a vendor's lien exists, the answer to such a contention would be threefold. A vendor's lien upon real estate is a creation of the courts of equity, upon the equitable consideration that where the vendor has taken no security for the purchase money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with it, and the other acquire, the title, without payment of the purchase price of the land. It exists, if at all, independent of any contract, — is personal to the vendor; and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abondoned it as security, it will be held to be waived. Pom. Eq. Jur.; Cowl *v.* Varnum, 37 Ill. 184; Richards *v.* Leaming, 27 Ill. 432. Thus taking an independent security will discharge the lien. Conover *v.* Warren, 1 Gilman, 498.

It is manifest that when the deed and mortgage back to secure the purchase money are parts of a single transaction, as in this case, that one estate may be conveyed by the deed, and a wholly different interest conveyed by the mortgage; as if the fee be granted by the deed, and an estate for life or for years mortgaged. The power of the parties to so contract cannot be questioned. If the vendor saw proper to take security by mortgage upon less than the whole land, or upon less than the estate conveyed, for the unpaid purchase money, there is no reason why it would not be a valid contract, and the residue of the land or estate pass by the deed unincumbered by any lien in his favor. But the bill in this case is for the foreclosure of the mortgage given to secure the purchase money, and proceeds upon the theory that in equity the mortgage attached to and became a lien upon the fee, which is alleged to be in Mrs. Lehndorf, and is to enforce the security under the contract, — a theory wholly inconsistent with the preservation of the vendor's lien.

Again, as before said, the lien created by implication in favor of the vendor is personal to him, and is not assignable or transferable, even by express contract, between the vendor and an assignee. It can be enforced only by the vendor himself. Richards *v.* Leaming, *supra;* Keith *v.* Horner, 32 Ill. 524; McLaurie *v.* Thomas, 39 Ill. 291; Markoe *v.* Andras, 67 Ill. 34; Moshier *v.* Meek, 80 Ill. 79. This is an established rule in equity, and is an insuperable obstacle to the enforcement of a vendor's lien by appellee. Such liens are secret; often productive of gross injustice to others dealing in respect of the property to which they attach; and courts of equity will not extend them beyond the requirements of the settled principles of equity.

But it is said that, the deed and mortgage being part of the same transaction, the title would not vest as against the purchase money; and the principle so often announced by this and other courts, that in such case, there is no interregnum between the effective operation of the deed and mortgage in which judgment liens and the like can attach as against the mortgage security, is sought to be invoked. The doctrine can have no application to the facts of this case. It is true, as so often held, that in the case stated, the making and delivery of the deed and mortgage, being simultaneous and part of one transaction, are to be construed as one act; *eo instante* upon the delivery of the deed the mortgage becomes effective, and the title passes to the mortgagor, subject to the lien of the mortgage. The mortgage attaches to the title conveyed in its transmission from the vendor to the vendee, and obviously, is effective in arresting the passage of the title so far only as it reconveys the estate to the original vendor. Therefore, if, by deed, a life estate is conveyed to one, and the fee to another, and, as part of the same transaction, the life-estate is mortgaged by the grantee thereof to the grantor, the mortgage would attach to the life-estate, and the life-tenant would take subject to the lien, and the fee would pass unaffected by the mortgage.

It is also insisted that the children of Mrs. Lehndorf are mere volunteers, who paid nothing, and therefore, in equity, their interest should be subject to the payment of this purchase money. We know of no recognized principle of equity by which the case can be affected by that consideration. If it be conceded they paid nothing, it is apparent defendant in error has no such equity as should prevail against their title. It is not enough that they are not purchasers for value; the party questioning their title must show himself legally or equitably entitled to the relief. When defendant in error purchased the notes of Humphrey he had

notice by the record of the state of the title; and that the mortgagor, in the mortgage given to secure them, had a life estate only in the lands mortgaged. He must be presumed to have known that the mortgage conveyed, subject to the condition of defeasance, the life-estate of Mrs. Lehndorf only; and also that the assignment of the notes, or of the notes and mortgage, could not transfer to him any equitable lien Humphrey might have had upon the fee in the land for the unpaid purchase money. Two thousand dollars of the consideration was paid at the execution and delivery of the deed, but by whom does not appear. If the children paid nothing, it was neither unlawful nor immoral for the parents, or either of them, to provide for the future welfare of their offspring by purchasing this land, and having the fee deeded to them, if done without fraud as to existing creditors, and with the knowledge and consent of their grantor. No fraud is alleged or shown, nor is it shown that the mortgage upon the life-estate of Mrs. Lehndorf was or is inadequate security for the money remaining unpaid to the defendant in error; but, if it was, it could make no difference. As we have seen, it is not purchase money in his hands, in any sense in which a lien can be enforced in equity otherwise than by a foreclosure of the mortgage upon the estate and interest of which Mrs. Lehndorf was seised; that is, her life-estate in these lands.

It appears by the bill that the deed was made to Mrs. Lehndorf, and her heirs by her present husband, etc., at her request. The grantor had full knowledge of the grant, and took back a mortgage to secure the unpaid purchase money, executed by Mrs. Lehndorf and her husband only. Defendant in error purchased the notes with notice of the facts, as disclosed by the record, and, if he must lose because of the inadequacy of his security, he cannot complain.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Estate Tail Converted by Statute into an Estate for Life to Grantee, and Remainder in Fee to his Heirs of the Body.

Wheart *v.* Cruser, 49 N. J. L. 475; 13 A. 36.

In the trial court, in rendering judgment for the plaintiff, Judge Magie said:—

"The cause is of such importance as to justify and demand a statement of the views of the court on the legal question presented. That question respects the title which Matthias Van

Dike Cruser, the father of the plaintiff, took under the will of Frederick Cruser, deceased. If the title was or became a fee-simple, then the defendant must succeed. If the title, under the statute of 13 Edw. I. (called the 'Statute of Entails'), was a fee-tail, then the plaintiff has a right to recover. The solution of the question depends on the construction of the following clause of the will of Frederick Cruser, deceased, viz.: 'I give and devise unto my son, Matthias Van Dike Cruser, his heirs and assigns by his present wife, Sallie Ann, forever, the farm, etc.

"The argument of defendant's counsel was mainly directed in the line of two opinions given by eminent counsel respecting the true construction of this clause. Both these opinions have been before me and have received, as they deserve, most careful consideration. The opinion of Mr. Bradley, now associate justice of the Supreme Court of the United States, was given in 1866. He first takes the position that the clause in question contains no words of procreation, nor any equivalent words, and that its words do not necessarily imply the descendants of the devisee, for he says, 'the heirs of M. V. D. C. by his present wife, Sally Ann, must be descended from her, but need not necessarily be descended from him; for if he should die first, and his wife should marry his next cousin, and have issue, this issue might become the collateral heirs of M.' He then likens the estate devised to a qualified fee, which he describes as being in the language of Mr. Preston, an interest given in its first limitation to a man and to certain of his heirs, and not extended to all of them generally, nor confined to the issue of his body. He then concludes that the limitation of this clause, restricting the descent to such of the heirs of M. V. D. C. as should be descendants of Sally Ann, his wife, creates a source of descent different from that prescribed by our laws, and so is repugnant to the estate granted to M. V. D. C., and void. This conclusion seems to indicate that the estate which M. V. D. C. took was a fee-simple. The foundation of this conclusion is evidently the alleged lack of words of procreation, or words of equivalent meaning. His contention is that the words, 'heirs of M. V. D. C. by his present wife, Sally Ann,' do not necessarily import the issue of M. V. D. C. If this premise is incorrect, the conclusion must be rejected. I feel constrained to regard the words as entirely equivalent to 'heirs of the body of M. V. D. C. by his present wife, Sally Ann.' This instrument to be construed is a will. What are we to ascertain is the intent of the testator? No one who reads the clause will doubt that his intent was to limit the estate to the issue of M. V. D. C. by Sally Ann. The books

are full of illustrations of precisely similar inferences of intent, drawn from the use of similar language. Thus, in Den *v.* Cox, 9 N. J. Law, 10, the phrase, 'his lawfully begotten heir,' was held to create an estate tail, and to be equivalent to 'lawfully begotten heir of his body.' Yet the words did not necessarily import the issue of the devisee, and would have been entirely satisfied by a descent to any heir lawfully begotten, though not of his issue. The words 'heirs male,' in a devise, have always been held to import heirs of the body; and yet they would be entirely satisfied by any male heirs, lineal or collateral. Den *v.* Fogg, 3 N. J. Law, 819. These illustrations might be indefinitely multiplied. The present case is not without precedent, and the view I have taken is not without the support of authority. In Vernon *v.* Wright, 7 H. L. Cas. 49, a devise to 'the right heirs of my grandfather, by Mary, his second wife, forever,' was held to create an estate tail. The words were said to comprehend words of procreation, and to be equivalent to heirs of the body of the grandfather, begotten on the body of the wife named. In Sommers *v.* Pierson, 16 N. J. Law, 181, a devise to J. S. and 'to his heirs by his present wife, Anne,' was held to create an estate tail. The opinion was by Ford, J., and concurred in by Hornblower, C. J. The judgment of the Supreme Court was afterwards reversed by the court of errors; but no opinion seems to have been delivered, and the reversal was in 1841. It is not necessary to infer that the reversal went on the ground that the construction given to this clause by the Supreme Court was erroneous. There was a subsequent clause in the will then under consideration which provided that the lands devised were, after the death of the widow, to whom they were given for life, to 'cede to J. S., his heirs and assigns, to all intents and purposes.' It was contended in the Supreme Court that this clause controlled and passed a fee-simple. We may fairly presume the same contention was made in the court of errors, and the reversal was probably on that ground. The case, therefore, is not without weight. Upon these grounds, I think the words of this clause are to be taken as including the idea of procreation, and as meaning 'heirs of the body' of M. V. D. C. by his wife, Sally Ann.

"The other opinion was by A. O. Sabriskie, afterwards chancellor. His conclusion is that M. V. D. C. took an estate in fee-simple. This conclusion is upon the force of the word 'assigns,' which, he insists, indicates a clear intention to give to M. V. D. C. a power to sell. The remaining part of the devise, he thinks, would have its due effect if held to mean that if M. V. D. C. should die without having sold the farm, his

heirs by his wife, Sally Ann, would take as purchasers. He admits that, unless that construction be given, the clause will come literally within the eleventh section of the descent act which provides for the disposition of estates which would be estates tail under the statute of entails. But he suggests that an estate tail special is not within that section, because, as he well observes, a literal application of the sections to such estates will invariably thwart the will of the testator. This suggestion need not be considered, because, in Zabriskie *v.* Wood, 23 N. J. Eq. 541, the court of errors expressly decided that the eleventh section did apply to all estates tail, whether general or special. The force attributed by Mr. Zabriskie to the word 'assigns,' in this clause, is, in my judgment, excessive and inappropriate. In Den *v.* Wortendyke, 7 N. J. Law, 363, the question was whether an estate in fee or in tail passed under a clause of a will, and the same contention was made. Chief Justice Kinsey uses the following language: 'In the outset, I will remark that little or no importance is to be attached to the use of the word "assigns," in this case; a circumstance upon which a considerable part of the argument was founded. I am not aware of a single case wherein, a certain interest having been given in a will, this word has been held to enlarge, or in any manner to affect, this interest. Every interest recognized by the law unless under particular circumstances, is the object of an assignment. It belongs essentially to every species of interest or property; and the introduction of the term is, therefore, in every case, superfluous and inoperative in a conveyance of property. The first section of Littleton shows that the word has no enlarging power in a conveyance, and Coke * * * shows that it is the same in a case of a will. The argument, therefore, resting on the basis, is entitled to no consideration.' In the section referred to by the learned chief justice, Littleton declares that a purchase by the words, 'to have and to hold to him and his assigns forever,' would only pass an estate for life. Coke, in his Commentary, says that a devise 'to him and to his assigns forever' will pass a fee-simple by the intent of the devisor. But it is plain that this intent is drawn, not from the use of the word 'assigns,' but the use of the word 'forever;' for he adds that under a devise 'to one and his assigns,' without saying 'forever,' the devisee hath but an estate for life. Co. Litt. 96. In Lutkins *v.* Zabriskie, 21 N. J. Law, 337, on a devise to A., and to her heirs lawfully from her body begotten, and assigns, forever, it was contended that A. took a fee-simple, and among other reasons, because of an intention to be inferred from the use of the word 'assigns.'

Chief Justice Hornblower held that the word 'assigns' had never been considered sufficient to control previous words of limitation. Upon these cases it seems to me the word relied on has never been applied to enlarge an estate under the circumstances such as appear in this case. The force attributed to the word is inappropriate, because, in any event, the estate taken by M. V. D. C. was vendible and assignable. Under such circumstances, there is no inference to be drawn except of an intent to pass a vendible and assignable estate.

"It was contended on the argument that the word 'forever,' in this clause, tended to the same construction reached by Mr. Zabriskie. But, although this word often operates to indicate an intent to create a fee simple, yet it will not operate to create or impede the creation of an estate tail. Such was the view of Chief Justice Ewing in Den *v.* Cox, 9 N. J. Law, 10, and the cases there cited, and many others sustain that view. In Vernon *v.* Wright, *ubi supra*, Crowder, J., expresses the same view, and says the word would not enlarge the limitation of the estate tail, but only import its continued duration. The result is that, in my judgment, the plain intent of testator was to create an estate which, under the statute of 13 Edw. I., commonly called the 'Statute of Entails,' would have been an estate in special tail. Upon the authority of Zabriskie *v.* Wood, *ubi supra*, that estate fell within the provisions of section 11 of the descent act, and became an estate for life in M. V. D. C., the devisee, with remainder to his children in fee-simple. See also Redstrake *v.* Townsend, 39 N. J. Law, 372.

"It was suggested on the hearing that there might be a question, under section 11, as to the amount of estate to which plaintiff would be entitled. He is one of seven children of M. V. D. C. by his wife Sally Ann. M. V. D. C. had a child by a previous wife. If the last-named child obtains an interest under section 11, it is plain that the intention of the testator is not regarded. But the question is not before me, because plaintiff only claims one-eighth of the land. If before me, the case of Zabriskie *v.* Wood, *ubi supra*, settles it, for in that case the statute was so construed as to cast the devised estate upon a child to whom it was the evident intent of the testator that the estate should not pass. I am therefore constrained to find for the plaintiff, and that he is entitled to judgment for the lands claimed, etc., and his costs of suit," etc.

A writ of error was brought to remove the judgment and proceedings to this court.

Per Curiam. The judgment in this case should be affirmed, for the reason given by the court below. Unanimously affirmed.

CHAPTER V.

ESTATES FOR LIFE.

Hayward *v.* Kinney, 84 Mich. 591; 49 N. W. 170.
Jenks *v.* Horton, 96 Mich. 13; 55 N. W. 372.
Duncombe *v.* Felt, 81 Mich. 332; 45 N. W. 1004.

Condition Against Alienation of Life Estate.

Hayward *v.* Kinney, 84 Mich. 591; 48 N. W. 170.

CHAMPLIN, C. J. The bill in this case was filed to foreclose a mortgage executed by Francis H. Strong and Georgia A. Strong, his wife, to Israel Hall on the 10th day of November, 1866, to secure to the said Israel Hall the payment of the sum of $15 000 mentioned in a promissory note of even date with the mortgage, with annual interest thereon. This mortgage was duly acknowledged and recorded in the office of the register of deeds for the county of Lenawee on the 16th day of November, 1866. The mortgage purported to sell and convey unto Israel Hall, as the party of the second part, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 21, township 8 S., range 2 E., Michigan. The bill of complaint sets forth that on or about the 23rd day of February, 1882, Israel Hall assigned said mortgage to the complainant in his suit for the use and benefit of Zackra E. Strong and Olive May Strong, children of the said Georgia A. Strong, one of the mortgagors mentioned in said mortgage, together with the note and all moneys then due and the interest that might hereafter grow due on said note and mortgage. This assignment was duly acknowledged on the 23d day of February, 1882, and was recorded on the 25th of that month. The bill further states that on the 18th day of June, 1866, the said Francis H. Strong, one of the parties of the first part in the said indenture of mortgage, and Joseph T. Strong, Chester W. Strong, and Gertrude J. Cole were the owners in fee and tenants in common of the said premises; and on the date last mentioned Joseph T. Strong and his wife, Chester W. Strong, and Gertrude J. Cole, for the consideration of $1,000, executed and delivered to Francis H. Strong a certain quitclaim deed, thereby granting and selling unto the said Francis H. Strong all their right, title, and interest in and to the said premises, to have and to hold the said premises with the

appurtenances unto the said Francis H. Strong, the party of the second part in said deed mentioned, during his natural lifetime, and his heirs and assigns of his heirs, forever, but not to be conveyed during the lifetime of the said Francis H. Strong; that this deed was duly acknowledged on the 18th day of June, 1866, by the grantors, and was recorded on the 2d day of July, 1866, in the office of the register of deeds of said county of Lenawee. The complainant further states that the said indenture of mortgage before mentioned, executed by the said Francis H. Strong and Georgia A. Strong, his wife, to the said Israel Hall, was given upon and intended to give all the right, title, and interest of the said Francis H. Strong and Georgia A. Strong in and to the said premises described therein; that said Zackra E. and Olive May Strong in the said assignment of mortgage mentioned are the sole and only issue of the said Francis H. Strong and Georgia E. Strong; that both are living, and are under the age of 21; that about the 1st day of January, 1878, said Francis A. Strong left and abandoned his children without providing them any means whatever for their education, support, or maintenance, and has ever since persisted in so deserting them, and wholly neglected and refused to provide anything whatever for them; that the said mortgage was assigned to the complainant by the said Israel Hall for the use and benefit of said children in order that the complainant might collect the same and apply the proceeds thereof for their use and benefit; and that the same was and is the only means from which support can be provided for them. The complaint further sets out that this mortgage so assigned to him contained no power of sale as required by the laws of the State, to authorize its foreclosure by advertisement, and that the complainant, being entirely mistaken and misled by ignorance of this fact, on the 20th day of May, 1882, commenced proceedings to foreclose the mortgage by advertisement, prosecuted the same to sale, and became the purchaser thereat, and received the sheriff's deed therefor; that the deed so received was acknowledged on the 28th day of August, 1882, and recorded on the 29th day of August in the office of the register of deeds of Lenawee County; that he supposed that the proceedings to foreclose said mortgage by advertisement were regular, valid, and binding in law. He also states that on the 7th day of December, 1883, said Georgia A. Strong, by the name of Georgia A. Hayward (she having in the meantime married the complainant), in order to protect her children, as the beneficiaries under said mortgage, executed a quitclaim deed of the premises to the complainant in trust for the use and benefit of said children; that said deed was

duly acknowledged, and was afterwards recorded on the 14th day of November, 1884, in the office of the register of deeds of Lenawee County. The bill also sets forth that previous to the execution of said deed by Georgia A. Hayward, she had acquired a tax-title upon said premises by deed from Charles M. Croswell, who had obtained the auditor-general's deed for the taxes of 1867; but it further states that such deed, on account of errors in the assessment of said taxes of 1867, was absolutely void, and that no title whatever in and to said lands by virtue of said deed vested in the said Georgia A. Strong, now Hayward. He further states that the mortgaged premises had not been redeemed from the sale, and he, still being mistaken and utterly ignorant of the fact that the mortgage contained no power of sale, and honestly believing the foreclosure proceedings valid, brought an ejectment to obtain possession of the land in the circuit court for the county of Lenawee against the defendant Amos A. Kinney and Andrew Church and Charles Church, who were then in the possession of the premises, holding the same adversely to the complainant under claim of title; that issue was framed in said suit and recovery had in favor of the plaintiff therein; that before the time fixed by the statute had expired a new trial of the cause was obtained by the defendants, and he, having then discovered the fact that the mortgage did not contain a power of sale, ordered the ejectment suit discontinued. The court refused to do so, for the reason that the beneficiaries of the mortgage appeared by another attorney, and asked leave to prosecute the suit, and that the suit resulted in a verdict and judgment for the complainant; that for some reason which the complainant does not explain, the suit was finally discontinued before the commencement of this suit to foreclose the mortgage. The complainant further expressly charges that up to the time he withdrew from said cause he prosecuted said ejectment suit in utter ignorance of the mistake as to his title to the mortgaged premises for the recovery of which said ejectment suit was instituted, and that he honestly believed that his title to said mortgaged premises was perfect to the extent of the right, title, and interest of said Francis H. Strong and Georgia A. Strong therein, and that, had he not been misled in respect to said title, he would have foreclosed said mortgage in equity before the expiration of 15 years from the time the same became due. He further states that Francis H. Strong, one of the mortgagors, is not a resident of this State, and has not been for 11 years last past, and that he is credibly informed, believes and charges that the said Strong is financially irresponsible and has been ever

since said note became due, and that the amount due to the complainant upon said note and mortgage, as trustee of said minor children, will be wholly lost as to said children unless the same is realized by the sale of the mortgaged premises by foreclosure. He further states that the note which was delivered at the time the mortgage was executed was payable on the 10th day of November, 1869, and that there is now due and unpaid upon said note and mortgage the sum of $3,860, and that no proceedings at law have been had to recover the debt or any part thereof, except as before stated. He further states that from an examination of the records of deeds and mortgages in the office of the register of deeds in the county of Lenawee it appears that Amos A. Kinney and Lucinda Kinney have, and claim to have, rights and interests in the premises described in said indenture of mortgage, or in some part or parts thereof, as subsequent purchasers, incumbrancers or otherwise. He prays for a foreclosure of the mortgage in the usual form.

The defendants Amos A. Kinney and Lucinda Kinney demur to the bill for want of equity, and for the reason that the bill had not been exhibited within fifteen years from the time the note and mortgage became due and payable, which demurrer was overruled, and thereupon they answered, admitting the execution and delivery of said note and mortgage to Israel Hall and the execution, acknowledgment, and recording the assignment as stated in the bill; admitting that the whole amount of said note, according to its terms, is due and unpaid; admitting also that proceedings were had to foreclose the mortgage by advertisement, as stated in the bill, and that such proceedings were void for the reasons stated in the bill. They admit also the commencement of the suit in ejectment, and the proceedings thereon, as stated in the bill, and the discontinuance of the suit. They admit that they have, and claim to have, rights and interests in the premises, and that such rights and interests were acquired by them subsequent to the date of said mortgage. They aver that the defendant Amos A. Kinney has acquired all the right, title, and interest of the said Francis H. Strong under and by virtue of the sheriff's sale and deed under the judgment executed against said Francis in the suit in the circuit court for the county of Lenawee; and also several tax-titles under deeds made by the auditor-general of said State on sales of said premises made pursuant to law for delinquent taxes, and that the defendant Lucinda Kinney has also purchased the premises under a tax-sale made by the auditor-general of the State for delinquent taxes pursuant to law, and received a deed therefor. The answer is also coupled with a demurrer based upon the ground

that the bill was not filed within 15 years after the mortgage became due and payable, and no payment had been made thereon. A general and special replication was filed to the answer of Amos A. and Lucinda Kinney, the defendant Georgia A. Hayward admitting the execution of the mortgage by herself and Francis H. Strong as charged in said bill of complaint and the assignment thereof, and that no part of the mortgage has been paid; admits that the sum stated in the bill is now due as therein charged; and also admitting all other material facts charged in said bill. Proofs were taken in open court before the Hon. P. Loveridge, from which it appeared that Ralph P. Strong was at the time of his death the owner of the premises; that he died in the fall of 1864, leaving as his heirs at law four children, namely, Joseph T., Francis H., Chester and Gertrude Strong, who was married to a man by the name of Cole. It was also proven that the widow of Ralph P. Strong is dead. The defendants Amos A. and Lucinda Kinney introduced in evidence several tax-deeds of the premises, against the objection of the complainant's solicitor, and also the proceedings under the attachment suit set up in his answer. The circuit court entered a decree in favor of the complainant for the foreclosure and sale of the mortgaged premises.

Since the decree of the court below, the decision in the case of McKesson *v.* Davenport (Mich.), reported in 47 N. W. Rep., at page 201, having been brought to the attention of the solicitor for the defendant he waives the position taken by him that the statute referred to in that decision applies to the case under consideration.

He also insists, as does the solicitor for the complainant, that adverse claims and titles to land cannot be tried in a suit to foreclose a mortgage, but the defendant's solicitor insists that under the general rules of equity the mortgage has become stale, and the statute of limitations can be applied to it. We do not think that this position is tenable. The complainant shows sufficient excuse for delay in filing this bill for the foreclosure of the mortgage.

Defendant's solicitor further claims that the clause in the deed of the heirs to Francis H. Strong, reading as follows: "But not to be conveyed during the lifetime of said Francis H. Strong," operated as a restraint upon the right of alienation of Francis H. Strong, and therefore he could not give a valid mortgage upon the three-fourths of the premises conveyed to him by that deed, he only having a life estate in three-fourths of the premises, and his right to convey being prohibited. These words, if effectual for any purpose, operate and were evidently intended as a condi-

tion subsequent. The deed created a life-estate merely in three-fourths of the premises, and the insertion of the words served to make that an express condition which at the common law was implied in every estate for life or years. 2 Bl. Comm. 153. Such condition, however, defeats the estate to which it is annexed only at the election of him who has the right to enforce it. No one entitled to enforce the condition has sought to defeat the estate granted to Nathan Strong, and until this is done the mortgagee has a right to enforce his security to the same extent as if the condition was not contained in the deed.

The defendant, Amos A. Kinney, claims as a subsequent purchaser under an execution sale, but this is subject to the mortgagee of the complainant, and he was properly made a party defendant. The complainant failed to show that Lucinda M. Kinney had any interest in the premises which was subject to his mortgage. The record discloses that she had a tax-title upon the premises which the complainant must have known, could not be litigated in this suit, and there was therefore no reason for making her a party. The bill will be dismissed, with costs, as to her, the decree of the court will be affirmed, with costs, as to the other defendant, and no writ of assistance will be awarded to put Amos A. Kinney out of possession of the premises which he claims to hold by a paramount title. The other justices concurred.

Liability of Life-Tenant for Taxes.

Jenks *v.* Horton, 96 Mich. 13; 55 N. W. 372.

Bill by William L. Jenks against Rebecca Horton to establish a lien for taxes paid by complainant on certain premises, and to compel the payment of other taxes assessed on said premises. Decree for complainant. Defendant appeals. Modified and affirmed.

The agreed facts in this case are as follows: (1) Prior to May 8, 1869, the ownership of the land was in Rebecca Horton, a widow of Nelson D. Horton, deceased, and Carlos D. Horton and Mary E. Beard, the children and heirs at law of Nelson D. Horton, and that the property was the homestead of Nelson D. Horton. (2) May 8, 1869, the said Carlos D. Horton and Mary E. Beard gave to Rebecca Horton a life lease of said premises. (3) By sundry and mesne conveyances the title of Carlos D. Horton was conveyed to Frances S. Farrand. (4) May 22, 1884, Frances S. Farrand conveyed the interest acquired from Carlos D. Horton to Etta M. Beard, and upon

the same day the same Etta M. Beard gave to B. C. Farrand a mortgage on the entire reversion for $918 90, to secure the purchase price of the interest conveyed to her; that said mortgage contained a covenant on the part of the mortgagor to pay all taxes assessed upon said premises. (5) Said mortgage was assigned June 16, 1884, to George S. Barrett and by him foreclosed for the interest accrued and unpaid; the sale taking place February 27, 1886, and a sheriff's deed being made to George S. Barrett. Redemption expired. (6) May 7, 1887, the said George S. Barrett conveyed, by ordinary quitclaim, the said premises to B. C. Farrand and W. L. Jenks, and on the 18th day of September, 1889, the said Barrett executed in person a conveyance by quitclaim, in usual form, of the said premises to the same grantees, and the same Farrand conveyed by ordinary warranty deed, except as against existing tax claims and mortgages, his interest in the said premises to Sheldon A. Wood, on September 23, 1889, and after the filing of the original bill in this case the said Sheldon A. Wood conveyed, without covenants, his interest in the said premises to complainant. (7) September 20, 1886, the said George S. Barrett redeemed the said premises from the sale made for unpaid taxes of 1882 and 1883, paying therefor, for the taxes of 1882, the sum of $84.90, and, for the taxes of 1883, $71.14. (8) September 27, 1887, the said B. C. Farrand and W. L. Jenks redeemed for the taxes of 1884, paying therefor $62.94; September 25, 1888, the said parties redeemed for the taxes of 1885, paying therefor $68.70; September 27, 1889, the said Jenks and Wood redeemed for the taxes of 1886, paying therefor $71.56; and all the rights of said Barrett for taxes paid were transferred to said Farrand and Jenks and the rights of said Farrand and Jenks transferred to Jenks and Wood, and the rights of said Wood transferred to said complainant by assignment. (9) At the time of filing the original bill there were the ordinary city, State and county taxes assessed upon said premises for the years of 1887, 1888, and 1889, in all amounting to upwards of $161, unpaid. (10) Said Rebecca Horton has occupied a portion of the premises continuously since the lifelease given to her in May, 1869, and has not paid any taxes assessed thereon, beginning with the year 1882. (11) From September 1, 1885, to January 20, 1890, Etta M. Beard and her family occupied the property described in the bill as a home; Mrs. Horton also living there during the same time. The court entered a decree that the complainant had a lien upon the life estate of the defendant for the taxes of 1882 to 1886, inclusive, which had been paid by the complainant and his assignors, and for the unpaid taxes

of 1887, 1888, 1889: that she pay the amount of such taxes within 60 days after service upon her of a certified copy of the decree, and that, in default thereof, her interest be sold by the sheriff of the county, in the manner provided for the sale of real estate on execution for the taxes to and including the year 1886; and that, in default of the payment of the taxes for the subsequent years above named, a receiver be appointed to receive the rents and profits of the premises for the purpose of paying such taxes.

GRANT, J. (after stating the facts). Defendant's counsel insist (1) that complainant has no lien or right of action for the taxes prior to and including 1886; that (2) under our system of taxation complainant is not entitled to a receiver for the unpaid taxes.

1. It is conceded that the law imposes upon a life tenant the duty to pay the taxes assessed upon the land. It is insisted, however, that the personal covenant of the reversioner in the mortgage to Frances S. Farrand to pay the taxes, and the joint occupancy of the premises by the defendant and her daughter, the reversioner, operated to relieve the defendant from the payment thereof. The defendant, however, was a stranger to the agreement between the reversioner and B. C. Farrand. The fact that a reversioner mortgages his reversion, and in the mortgage agrees with the mortgagee to pay the taxes, is not of itself a release of that duty on the part of the life tenant. Had there been a contract between the defendant and her daughter by which the daughter had agreed to pay the taxes, a different question would have been presented, which we are not now called upon to determine. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life tenant. The agreed facts contain nothing showing any intention or agreement to release defendant from this duty to pay the taxes. The decree, therefore, covering the taxes which the complainant and his assignors have paid, is affirmed.

2. In New York the practice of appointing receivers in similar cases prevails (Cairns *v.* Chabert, 3 Edw. Ch. 312; Sidenberg *v.* Ely, 90 N. Y. 257); but under our method of enforcing the collection of unpaid taxes upon real estate, and under our system of foreclosing liens, we do not think the appointment of receivers the proper remedy. When it is determined by adjudication that defendant is under obligation to pay the taxes, it is quite probable that she will do so. The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases. In this respect the decree will be modified. The

taxes, however, for the years named are past due, and, if not paid within 60 days after service upon the defendant of a certified copy of this decree, the complainant may pay them, and include the amount thereof in the sale ordered by this decree. The complainant will recover costs of court below, and the defendant costs of this court. The other justices concurred.

Waste by Life-Tenant.

Duncombe *v.* Felt, 81 Mich. 332; 45 N. W. 1004.

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises. The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres, subject to a life-estate in the defendant. That the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt. That said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife. That at about the time of conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record. The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased. That upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states: "Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to be cut, and is cutting, lumbering, and removing from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber. Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the value thereof. Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the

amount of at least five hundred dollars. And your orator further shows that said cutting and removing said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt to do so. All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator." The lease set out in the bill of complaint as executed before the complainant derived his title under the sheriff's deed, and contains the following clause: "To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party, and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." A general demurrer was filed, and on the hearing of the court below was overruled, and decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there is only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction. The rights of the parties must be determined by the construction given to these clauses in the lease above granted. The title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises "for and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying nothing." The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause

which it is claimed gives the defendant the right to take the timber in question. "And it is expressly understood that the second parties are to have as full and complete control of said premises, while they are or either of them shall live, as though such conveyance had not been made." The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases without impeachment for waste.

Counsel for defendant insists that the doctrine laid down in Stevens *v.* Rose, 69 Mich. 260; 37 N. W. Rep. 205, fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for waste. His claim is not sustained by that case. It was there held that the words "to have and to hold, and to use and control as the lessee thinks proper for his benefit during his natural life," clearly import a lease without impeaching for waste, and that the defendant had the right to do all those acts which such a tenant may exercise, but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there is only 9 acres of timber on the whole 160-acre tract, and that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause "without impeachment for waste" never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste. 10 Bac. Abr., p. 468, tit. "Waste." In Packington *v.* Packington, decided in 1744, and cited by Bacon (reported 3 Atk. 215), the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord Hardwicke granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf in his Cruise on Real Property (volume 1, p. 129), lays down the rule thus: "The clause without impeachment of waste, is, however, so far

restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate which is called 'equitable waste,' for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done." In 10 Bac. Abr. tit. "Waste," p. 469, it is said: "So, where a lease was made by a bishop for twenty-one years without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees until about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this court will model the exercise of that power," citing Abraham *v.* Bubb, Freem. Ch. 53. At the common law no prohibition against waste lay against the lessee for life or years deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law, but the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease "without impeachment of waste" had the effect of transferring to the lessee the property of the timber. Bowles' Case, 11 Coke, 79; Co. Litt. 220*a*. The modern remedy in chancery by injunction is broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. 4 Kent. Comm. (13th ed.) 78; Perrot *v.* Perrot, 3 Atk. 94; Aston *v.* Aston, 1 Ves. Sr. 264; Vane *v.* Barnard, 2 Vern. 738; Kane *v.* Vanderburgh, 1 Johns. Ch. 11. In the case of Kane *v.* Vanderburgh, *supra*, it was said: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." In this State an action on the case for waste is authorized by chapter 271, How. St. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the Statute of Gloucester, as he now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages; and this harsh rule was adopted by many of the American States by the early statutes. This

statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may take the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings to destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life-tenant is selling for his own gain and profit. The demurrer was properly overruled. The decree of the court below will be affirmed, with costs. The other justices concurred.

CHAPTER VI.

ESTATES ARISING OUT OF MARITAL RELATIONS.

SECTIONS I AND II.

ESTATE DURING COVERTURE AND CURTESY.

Bozarth *v.* Largent, 128 Ill. 95; 21 N. E. 218.
McTigue *v.* McTigue, 116 Mo. 136; 22 S. W. 501.

Marital Rights of Husband in Property of the Wife.

Bozarth *v.* Largent, 128 Ill. 95; 21 N. E. 218.

SHOPE, J. This was an action of ejectment, brought by James Bozarth, Mary L. Bozarth, and Ida B. Cook, the heirs at law of Louisa Bozarth, deceased, against William Largent, for the recovery in fee of the E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ section 17, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 8, all in township 23 N., range 2 W. of the third P. M., in Tazewell County. General issue was filed and a trial had, resulting in a finding and judgment for defendant. Plaintiffs below prosecute this writ of error. The facts are as follows: Louisa Bozarth, now deceased, being the owner in fee of said lands, which she had inherited from her father, was, on August 19, 1863, married to Asa Bozarth. They lived together as husband and wife until November 1, 1868,

when she died, intestate, leaving her husband, who is still living, and the plaintiffs, her children and only heirs at law, surviving her. On March 5, 1868, she and her husband executed their mortgage upon the lands in controversy, and other lands of the husband, to Anna R. Cohrs, to secure the payment of $2,500 evidenced by the note of Asa Bozarth, the husband, payable two years after date, with 10 per cent interest, payable annually, and containing a clause that, in default of the payment of the annual interest, the principal should become due. The mortgage was in the usual form, and contained a release of all homestead rights; and the wife acknowledged the release of all her rights of homestead, but the husband did not acknowledge the release of homestead, his acknowledgment being simply that he acknowledged the mortgage to be his free act and deed for the uses and purposes herein set forth. On March 27, 1873, Mary C. Maus, the assignee of said note and mortgage, filed her bill in the circuit court of Tazewell County against the said Asa Bozarth, and the plaintiffs and others, for the foreclosure of said mortgage. Summons was duly served on all the defendants, and a guardian *ad litem* was appointed for James, Ida B., and Mary Bozarth, the plaintiffs, they being then minors, who answered. At the May term, 1873, a decree was entered, foreclosing said mortgage, and finding due thereon the sum of $2,973.75, and a solicitor's fee of $125, provided for in the mortgage, and ordering a sale of the premises, etc. Sale was made under said decree July 12, 1873, to William Don Maus, for the sum of $3,048.84. The sale was made *en masse*, the master having failed to obtain bids on the several tracts when separately offered. Certificate of purchase was made and recorded the same day. At the May term, 1874, of the McLean circuit court, Albert Welch recovered a judgment against the said Asa Bozarth, John Bozarth, and Elihu Bozarth for $1,250.50 and costs. Execution was issued to the sheriff of McLean County, and returned August 19, 1874, when Welch assigned the judgment to George W. Thompson. On the same day an *alias* execution issued to the sheriff of Tazewell County, which came to that officer's hands August 20, 1874, and was levied on all the land sold under the foreclosure decree, and a certificate of levy was filed and recorded August 31, 1874. On October 10, 1874, a certificate of redemption from the sale under the decree of July 12, 1873, was executed by the sheriff of Tazewell County, and recorded the same day. On October 31, 1874, the land was sold *en masse* by the sheriff to Welch for redemption money and costs. On January 14, 1875, after the term of office of the

sheriff had expired, he made and delivered to Welch a deed for the premises, dating the same as of the day of sale. On the same day, Pratt, the then sheriff, also executed a deed to Welch for the lands on the same sale. Welch and wife, by their deed of December 1, 1875, conveyed the land to John Bozarth, and he, on May 22, 1882, conveyed the same to William Largent, defendant in error, who went into possession of the same.

At the common law a husband held in right of his wife all her lands in possession, and owned the rents and profits thereof absolutely. 1 Washb. Real Prop. 276; Tied. Real Prop., § 90; Haralson *v.* Bridges, 14 Ill. 37; Clapp *v.* Inhabitants of Stoughton, 10 Pick. 463; Decker *v.* Livingston, 15 Johns. 479. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate *jure uxoris*. Kibbie *v.* Williams, 58 Ill. 30; Butterfield *v.* Beall, 3 Ind. 203; Montgomery *v.* Tate, 12 Ind. 615; Croft *v.* Wilbar, 7 Allen, 248. It differed from curtesy initiate, in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. Wright's Case, 2 Md. 429–453. It is held in right of the wife, and was not added to or diminished when curtesy initiate arose. Subject to the husband's beneficial enjoyment during the coverture, the ownership remained in the wife, and, on dissolution of the marriage, was discharged from such estate of the husband. Stew. Husb. & W., § 146. Where there was marriage, seisin of the wife, and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the curtesy intimated, and which would become consummate upon the death of the wife in the lifetime of the tenant. A tenant by the curtesy was seised of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts. Tied. Real Prop., § 101; Howey *v.* Goings, 13 Ill. 95; Jacobs *v.* Rice, 33 Ill. 369; Cole *v.* Van Riper, 44 Ill. 58; Beach *v.* Miller, 51 Ill. 206; Lang *v.* Hitchcock, 99 Ill. 550.

The act of 1861, known as the "Married Woman's Act" provides: "that all the property, both real and personal, belonging to any married woman as her sole and seperate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, nothwithstanding her mar-

riage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." In this case, Louisa Bozarth, who was common source of title, was the owner of the land in controversy, as it is conceded, at the time of her marriage, August 19, 1863, to Aza Bozarth. The marriage having taken place after the act of 1861 had taken effect, and the wife being then the owner of the land in question, it was not, during her coverture, subject to the control, interference, or disposal of her husband, or liable for his debts or other obligations. The effect of the statute was to abrogate the husband's estate in her lands, or the estate he would have had at common law during the coverture, and consequently during that period he had no estate therein liable to execution or attachment. The act did away with the estate he would have had at common law, growing out of the mere marital relation, and of his curtesy initiate; and it therefore follows, if the wife had been living at the time of the redemption and sale by the creditor of her husband, that proceeding would not have divested any right of herself or husband, nor conferred any right upon the purchaser.

The question, however, remains whether Asa Bozarth, the husband, on the death of his wife, 1865, acquired an estate in her land as tenant by the curtesy. We have already seen that the property of a married woman, under the act of 1861, notwithstanding her marriage, was to be and remain during coverture her sole and separate property, and was not subject to the husband's control, or liable for his debts. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate; but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the curtesy is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property by virtue of her power over it, he will be held to have an estate by the curtesy at her death. The prevailing opinion seems to be that while separate property acts do suspend during coverture all the rights of a husband, or his creditors, in statutory separate property, they do not destroy curtesy, or prevent its vesting on her death, unless such an event is clearly excluded by the statute; as where the statute not only provides that the property of the wife shall be hers, etc., but also defines her husband's interest therein, if she dies intestate, in which case curtesy is excluded. Where she has power to alienate or charge

her property, she may thereby defeat curtesy, but the statute must contain express words to enable her to convey alone; and, also, when she has power of disposition of the property by will she may thereby defeat curtesy. Stew. Husb. & W., §§ 161, 243; In re Winne, 2 Lans. 21; Hatfield *v.* Sneden, 54 N. Y. 280; Noble *v.* McFarland, 51 Ill. 226; Freeman *v.* Hartman, 45 Ill. 57; Cole *v.* Van Riper, *supra*.

It will be seen that the married woman's act of 1861 does not attempt to define the husband's rights in his wife's property after her decease, nor does it give her any power of disposal of her separate property, independent of the husband. The purpose and effect of the statute was to secure to the wife the control of her separate property during coverture. During that period the husband's common-law rights in her property are suspended. We are of opinion that this act did not have the effect of destroying the estate by curtesy, but that, after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of the marriage, took a life-estate in her land as tenant by the curtesy. After the passage of the act under consideration, the estate, by the curtesy in the lands of the wife, did not vest in the husband until the death of the wife (Lucas *v.* Lucas, 103 Ill. 121; Beach *v.* Miller, 51 Ill. 206); but upon her death such estate became consummate, and vested in the husband in all respects as at common law (Noble *v.* McFarland, *Id.* 226; Shorthall *v.* Hinckley, 31 Ill. 219; Gay *v.* Gay, 123 Ill. 221; 13 N. E. Rep. 813; Castner *v.* Walrod, 83 Ill. 171). It follows that we are of opinion that upon the death of the wife, in 1868, leaving issue surviving, the husband, Asa Bozarth, became seized of a freehold interest in the lands in controversy as tenant by the curtesy, and which was subject to seizure and sale on execution against him.

The validity of the sale of the premises under the decree of foreclosure, and the redemption upon the execution issued upon the judgment in favor of Welch, and against the said Asa Bozarth, and the sale thereunder, are questioned by plaintiff in error. If the foreclosure sale was void for any cause, the judgment creditor redeeming therefrom acquired no title under his purchase, for the reason that his rights, like those of the purchaser at the sale under the decree of foreclosure, are dependent upon a valid judgment or decree of sale. Johnson *v.* Baker, 38 Ill. 99; Mulvey *v.* Carpenter, 78 Ill. 580; Keeling *v.* Heard, 3 Head, 592.

It is objected that there was no sufficient service of summons upon the plaintiffs in error, who were defendants in the foreclosure suit. The return to the summons therein is as follows:

"Executed this writ by reading the same to the within-named Asa Bozarth, James Bozarth, Ida Bell Bozarth, and Mary Bozarth, and by delivering to each a true copy hereof, on the 10th day of April, 1872," and properly signed by the sheriff. The process was returnable to the May term, 1873. The service was in apt time. The fact that the summons was read to the defendants did no harm, and that part of the return may be disregarded. It is apparent that the circuit court had, therefore, jurisdiction of the subject-matter and of the parties, and mere errors, or irregularities, if any, cannot be taken advantage of in this collateral proceeding.

It is objected that the mortgaged premises were improperly sold *en masse*. If this be conceded, it would not render the sale void; at most, it would only be ground for setting the sale aside on proper application to the court in apt time. It, however, appears that the land was offered by the master in separate parcels, and, receiving no bids therefor, it was then offered and sold *en masse*. We are not prepared to say that the action of the master was not warranted.

It is next objected that all the lands sold under the decree were redeemed *en masse*, and so sold to Welch under the execution. A judgment creditor's right of redemption is no greater or more extensive than that of the original debtor. He cannot redeem in a case where the original owner cannot redeem, and within the time allowed by law for redemption by the debtor. In Hawkins *v.* Vineyard, 14 Ill. 26, a quarter section of land had been sold, of which the debtor owned only 65 acres, and it was held he could not redeem the 65 acres, but that he must redeem the whole or none. A person cannot redeem an undivided share of land by paying his proportional share of the debt; and a part owner must redeem the whole. Durley *v.* Davis, 69 Ill. 133. A purchaser of a part of mortgaged land cannot redeem that part by paying his proportion of the debt. Meacham *v.* Steele, 93 Ill. 135. When the purchaser at a master's sale of an entire tract of land afterwards assigns an undivided interest in such purchase there can be no legal redemption of such undivided interest by a judgment creditor. Groves *v.* Maghee, 72 Ill. 526; Titsworth *v.* Stout, 49 Ill. 78. Section 25, c. 77, Rev. St., provides: "Any person entitled to redeem may redeem the whole or any part of the premises sold in like distinct parcels or quantities in which the same are sold. If the several mortgaged tracts had been sold separately, redemption might have been made of any one or more of the tracts. In such case the amount that each tract sold for would furnish the basis for determining the amount to be paid in order to redeem; but, as

the several parcels of land were sold together, and for a gross sum, neither the debtor nor his judgment creditor could redeem without paying the full amount for which the same sold, with interest. The law gives the debtor 12 months in which to redeem, after which time any judgment creditor of the debtor may also redeem within 15 months from the date of the sale; but, in so doing, the creditor will possess no greater right than his debtor had within the time limited for redemption by him. After the expiration of twelve months from the sale, the right of redemption of the judgment debtor is gone. He no longer has any interest in the premises, and cannot take advantage of mere irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale in pursuance of such redemption. The purchaser at the foreclosure sale makes no objection to the validity of the redemption, and, having accepted the money, the redemption was complete. The title of Asa Bozarth being gone by his failure to redeem within the time allowed by law, he was not injured by the sale *en masse* on the execution, if, indeed, the sale could have been otherwise made.

There is no force in the objection that the redemption should have been made in the name of Thompson, assignee of Welch, the judgment creditor. Sweezy *v.* Chandler, 11 Ill. 445. It in no way concerns the plaintiffs in error whether redemption was made in the name of the plaintiff in the judgment against Asa Bozarth or in the name of his assignee. No proof was made or offered at the trial tending to show that the premises, when sold under the decree of foreclosure, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead; nor does it appear that they were at any time so occupied. Therefore, the question of the right of homestead was not presented for adjudication, and cannot now be considered in this court. It may, however, be observed that the mortgage was executed and acknowledged before the act of 1872, relating to conveyances, took effect, and the cases cited by counsel were determined under the provisions of that act.

It is claimed that only the title of Louisa Bozarth passed by the sale under the decree of foreclosure, and therefore a creditor of her husband could not redeem from that sale. This contention is not well grounded. While the husband, as we have seen, at the time of the execution of the mortgage had no estate in the land, it was necessary to the execution of a valid mortgage or conveyance of his wife's estate therein that he should join in the mortgage or conveyance, which he did. The mortgage was in the usual form, and contained covenants of both the husband

and wife of good right to convey, seisin in fee, and of general warranty, and was sufficient to pass not only the estate of the wife, but also all the estate, right, and interest of the husband in the property, which he than had, or might subsequently acquire. If he had no estate by the curtesy initiate or otherwise during the life of the wife, upon her death he took an estate for life in this land as tenant by the curtesy, which, under the covenants of the mortgage, inured to the benefit of the mortgagor. Gochenour *v.* Mowry, 33 Ill. 331. The sheriff's deed was dated October 31, 1874, the date of the sale upon the redemption, but was, in fact, executed January 14, 1875, after the term of office of the sheriff had expired. Section 21 of the act relating to judgments, etc., provides that the redeeming judgment creditor shall be considered as having bid at the sale the amount of the redemption money paid by him, with interest thereon and the costs of the redemption and sale; "and, if no greater amount is bid at such sale, the premises shall be struck off to such person making such redemption, and the officers shall forthwith execute a deed of the premises to him, and no other redemption shall be allowed." It is urged that the provision of the statute requiring the deed to be made "forthwith" is mandatory, and that a failure in this respect would render the sale void. We are not prepared to so hold. The purchaser is entitled to a deed forthwith in such case, but the failure of the sheriff to make the deed immediately after the sale, will not render the redemption and sale invalid. This provision of the statute must be regarded as directory only.

It is lastly objected that Reeves, the sheriff, had no authority to make the deed after his term of office had expired. Section 30 of the act relating to judgments, etc., provides: "The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, etc." Freeman, in his work on Execution (section 327), says: "The officer who made the sale, whether he continues in office or not, is, in ordinary circumstances, and in the absence of statutory provisions to the contrary, the proper person to make the conveyance. * * * When the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact unless the new sheriff is specially authorized by statute, he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor.

We are of opinion that the deed made by the retiring sheriff, under our statute, was valid. If this is so, it will be unnecessary to determine whether the deed made by his successor in office is good or not. In any event, under the section of the

statute quoted, by one deed or the other, the title acquired under the redemption sale passed to the grantee in said deeds. The plaintiffs claimed an estate in fee in the land in controversy, with a present right of possession. Their father having a life-estate in the property, which has passed by virtue of the foreclosure sale, the redemption and sale thereunder, and the deeds in pursuance thereof to the defendant, they are not entitled to recover of the defendant the possession of said lands during the continuance of such estate. Until the termination of that life-estate by the death of the life-tenant, their right to a recovery must be postponed. Some questions are raised as to the effect of the proceedings before mentioned upon the fee to the land which is not now before us for consideration, and no adjudication is made in respect thereof. The judgment of the circuit court will be affirmed.

Curtesy in Wife's Separate Estate When Barred.

McTigue *v.* McTigue, 116 Mo. 136; 22 S. W. 501.

BRACE, J. This is an action in ejectment to recover possession of a lot in the city of St. Louis, in which the plaintiff had judgment, and the defendant appeals.

Both parties claim title under Hannah McTigue, deceased; the plaintiff being the only child and heir of the said Hannah, who died intestate; and the defendant the surviving husband of the said Hannah, and the father of the plaintiff. The title of the said Hannah was acquired by the following deed: "This deed, made and entered into this 12th day of January, 1876, by and between Adolphus Meier (widower), of the city of St. Louis, State of Missouri, party of the first part, and James Halloran, of the same place, party of the second part, and Hannah McTigue, wife of John McTigue, party of the third part, witnesseth: "That the said party of the first part in consideration of the sum of seven hundred dollars to him in hand paid by said party of the third part, the receipt of which is hereby acknowledged, and the further sum of one dollar to him paid by the said party of the second part, the receipt of which is hereby also acknowledged, do by these presents grant, bargain and sell unto the said party of the second part the following described lot or parcel of ground being and laying in the county of St. Louis, State of Missouri, to wit: Lot numbered fourteen in block No. 7, Adolphus Meier's first addition to the city of St. Louis, a plat of which is on file in the office of the recorder of deeds for St. Louis County, said lot having a front

on the south line of Cozens street of twenty-five feet by a depth of one hundred and twenty-three feet to an alley of fifteen feet wide; to have and to hold the same, with all the rights, privileges and appurtenances thereto belonging or in anywise appertaining, unto him, the said party of the second part, his heirs and assigns forever; in trust, however, to and for the sole and separate use, benefit, and behoof of the said Hannah McTigue. And the said James Halloran, party of the second part, hereby covenants and agrees to and with the said Hannah McTigue that he will suffer and permit her, without let or molestation, to have, hold, use, occupy, and enjoy the aforesaid premises, with all the rents, issues, profits and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband, and wholly free from his control and interference, debts, and liabilities, curtesy, and all other interests whatsoever, and that he will at any time and at all times hereafter, at the request and direction of said Hannah McTigue, expressed in writing, signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of said premises, or any part thereof, to do which full power is hereby given, and will pay over the rents, issues, profits and proceeds thereof to her, the said Hannah McTigue, and that he will, at the death of said Hannah McTigue, convey or dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof, in such manner to such person or persons, and at such time or times, as the said Hannah McTigue shall by her last will and testament, or any other writings signed by her, or by her authority, direct or appoint; and the said Hannah McTigue shall have power at any time hereafter, whenever she shall from any cause deem it necessary or expedient, by any instrument in writing under her hand and seal, and by her acknowledged, to nominate, and appoint a trustee or trustees in the place and stead of the party of the second part above named, which trustee or trustees, or the survivors of them, or the heirs of such survivors, shall hold the said real estate upon the same trust as above cited; and upon the nomination and appointment of such new trustees the estate in trust hereby vested in said party of the second part shall thereby be fully transferred and vested in the trustee or trustees so appointed by the said Hannah McTigue. And the said Adolphus Meier hereby covenants to warrant and defend the title to the said real estate against the lawful claims of all persons whomsoever, except all taxes, special or general, for the year 1876; and the said party of the second

part covenants faithfully to perform and fulfill the trust herein created. In testimony whereof the said parties have hereunto set their hands and seals the day and the year first above written." The plaintiff, who is a minor suing by her next friend, the said James Halloran, trustee in said deed, claims the right to the possession of the premises as the only child and heir at law of her mother. The defendant is in possession, and has been ever since the death of his wife, and claims as tenant by the curtesy.

There can be no doubt that by the terms of the deed an equitable estate of inheritance was vested in the said Hannah, which, upon her death intestate, descended to the plaintiff as her only heir at law, and that such estate was her separate, equitable estate. It is also well-settled law in this State that the husband is entitled to curtesy in the equitable estate of the wife of which she died seised, although such estate was limited to her separate use. Alexander *v.* Warren, 17 Mo. 228; Baker *v.* Nall, 59 Mo. 265; Tremmel *v.* Kleiboldt, 75 Mo. 255; 6 Mo. App. 249; Soltan *v.* Soltan, 93 Mo. 307; 6 S. W. Rep. 95; Spencer *v.* O'Neill, 100 Mo. 49; 12 S. W. Rep. 1054. Such seems to be the law generally in this country, except in those States where the estate of curtesy has been abolished by statute. Tied. Real Prop. (2d Ed.), § 105. And while "it is not competent at common law, in the grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy, a like rule does not prevail in equity, where an estate may be so limited as to give the wife the inheritance, and deprive the husband of curtesy, if the intent of the devisor or settler be express." 1 Washb. Real Prop. (5th Ed.), p. 175, § 15; 4 Amer. & Eng. Enc. Law, p. 965, note 3. As such was the evident intention expressed in the foregoing deed, the defendant's curtesy was barred, and the judgment of the circuit court so holding is affirmed. All concur, except Barclay, J., absent.

SECTION III.

DOWER.

Van Cleaf *v.* Burns, 118 N. Y. 549; 23 N. E. 881.
Hinchliffe *v.* Shea, 103 N. Y. 153; 8 N. E. 477.
McKaigg *v.* McKaigg, 50 N. J. Eq. 325; 25 S. 181.
Jones *v.* Fleming, 104 N. Y. 418; 10 N. E. 693.
Staigg *v.* Atkinson, 144 Mass. 564; 12 N. E. 354.

Dower When Barred by Divorce.

Van Cleaf *v.* Burns, 118 N. Y. 549; 23 N. E. 881.

Appeal from supreme court, general term, second depart-

ment, affirming a judgment entered upon the decision of the court at special term.

The plaintiff brought this action to recover dower in certain lands situate in the city of Brooklyn, of which one David Van Cleaf, deceased, was seised while he was her husband. She alleged in her complaint that she was married to said Van Cleaf on the 6th of July, 1875, and that he died November 12, 1884; that during said period he was seised and possessed of the premises in question, and that the defendants are in possession thereof, claiming to own the same. Without denying any of said allegations, the defendant Catherine Burns answered, alleging that on the 9th of April, 1881, said David Van Cleaf, who was then a resident of the State of Illinois, was duly divorced from the plaintiff, on account of her misconduct, by the judgment of a court in that State which had jurisdiction of the subject-matter and of the parties. The trial court found the following facts: "That in an action in the circuit court of Cook County, Ill., in which David Van Cleaf was plaintiff, and said Mary B. Van Cleaf was defendant, brought for a divorce and dissolution of the marriage for the cause and ground that said Mary B. Van Cleaf had willfully deserted and absented herself from said David Van Cleaf, her husband, without any reasonable cause, for the space of more than two years before the commencement of such action, which by the laws of Illinois was a ground for absolute divorce and dissolution of the bond of marriage, such proceedings were had that on April 9, 1891, judgment was granted and perfected therein in favor of said David Van Cleaf against said Mary B. Van Cleaf, dissolving the bond of marriage between them for the cause and ground aforesaid, which cause and ground was by said judgment adjudged to exist. That said court, in pronouncing said judgment, had jurisdiction of the subject-matter of the action and judgment, and of the parties thereto. That said David Van Cleaf was at the time of said action and judgment domiciled in Chicago, in the State of Illinois; and said Mary B. Nan Cleaf, on October 18, 1880, appeared in said action in person, and filed her answer in writing to the complaint, having just received notice of the commencement of the suit by the service on her in this State of the summons and complaint. That the plaintiff was during all the time above mentioned a resident of the city of Brooklyn, in the State of New York." The court found, as a conclusion of law, that the complaint should be dismissed upon the merits, with costs, to which the plaintiff duty excepted. The only proof given by either party on the trial was a stipulation admitting the facts as found. The case states that no other

facts appeared; and the parties stipulate, for the purpose of any appeal, that David Van Cleaf was seised in fee-simple of the premises in question between the date of his marriage to the plaintiff and the date of said divorce, and that such admission shall have the same effect as though found by the trial judge upon proper evidence.

VANN, J. (after stating the facts as above). Our Revised Statutes provide that "a widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage" (1 Rev. St., p. 740, § 1); but that, "in case of divorce dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed" (*Id.*, p. 741, § 8). It is further provided by the Code of Civil Procedure that, where final judgment is rendered dissolving the marriage in an action brought by the wife, her inchoate right of dower in any real property of which her husband then was, or was theretofore, seised, shall not be affected by the judgment; but that, when the action is brought by the husband, the wife shall not be entitled to dower in any of his real property, or to a distributive share in his personal property. Sections 1759, 1760. These provisions of the Code replaced a section of the Revised Statutes which provided that "a wife, being a defendant in suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." 3 Rev. St. (6th Ed.), p. 157, § 61, repealed Laws 1880, c. 245, § 1, subd. 4. An absolute divorce could be granted only on account of adultery, either under the Revised Statutes or the Code. 3 Rev. St. (6th Ed.), p. 155, §§ 38–42; Coke Civil Proc., §§ 1756, 1761. According to either, an action could be brought to annul, to dissolve, or to partially suspend the operation of the marriage contract. A marriage may be annulled for causes existing before or at the time it was entered into; and the decree, in such cases, destroys the conjugal relation *ab initio*, and operates as a sentence of nullity. *Id.*, §§ 1742, 1754. A marriage contract may be dissolved, and an absolute divorce, or a divorce proper, granted for the single cause already mentioned. Such a judgment operates from the date of the decree, by relieving the parties from the obligations of the marriage, although the party adjudged to be guilty is forbidden to remarry until the death of the other. It has no retroactive effect, except as expressly provided by statute. Wait *v.* Wait, 4 N. Y. 95. An action for a separation, which is sometimes called a "limited divorce," neither annuls nor dissolves the marriage contract, but simply separates the parties from bed and

board, either permanently or for a limited time. Code Civil Proc., §§ 1762–1766. Neither the nature nor effect of the judgment of divorce granted by the court in Illinois in favor of David Van Cleaf against the plaintiff appears in the record before us, except that the bond of marriage between them is stated to have been dissolved upon the ground that she had willfully deserted and absented herself from her husband, without reasonable cause, for the space of more than two years prior to the commencement of the action. It does not even appear that the decree would have the effect upon her right to dower in the State where it was rendered that is claimed for it here. Apparently, it simply dissolved the marriage relation; and whether it had any effect, by retroaction, upon property rights existing at its date, is not disclosed. A judgment of a sister State can have no greater effect here than belongs to it in the State where it was rendered. Suydam *v.* Barber, 18 N. Y. 468. There is no presumption that the statutes of the State of Illinois agree with our own in relation to this subject. Cutler *v.* Wright, 22 N. Y. 472; McCulloch *v.* Norwood, 58 N. Y. 562. If they do, the fact should have been proved, as our courts will not take judicial notice of the statutes of another State. Hosford *v.* Nichols, 1 Paige, 220; Chanoine *v.* Fowler, 3 Wend. 173; Sheldon *v.* Hopkins, 7 Wend. 435; Whart. Ev., §§ 288, 300. Adequate force can be given to the Illinois judgment, by recognizing its effect upon the status of the parties thereto, without giving it the effect contended for by the respondent. Barrett *v.* Failing, 111 U. S. 523; 4 Sup. Ct. Rep. 598; Mansfield *v.* McIntyre, 10 Ohio, 27.

The judgment appealed from, therefore, can be affirmed only upon the ground that a decree dissolving the marriage tie, rendered in another State, for a cause not regarded as adequate by our law, has the same effect upon dower rights in this State as if it had been rendered by our own courts adjudging the party proceeded against guilty of adultery. This would involve as a result that the expression, "misconduct of the wife," as used in the Revised Statutes, means any misconduct, however trifling, that by the law of any State is ground for divorce. Thus it might happen that a wife who resided in this State, and lived in strict obedience to its laws, might be deprived of her right to dower in lands in this State by a foreign judgment of divorce, based upon an act that was not a violation of any law of the State of her residence. It is important, therefore, to determine whether the provision that a wife shall not be endowed in case of divorce dissolving the marriage contract for her misconduct refers only to that act which is misconduct

authorizing a divorce in this State, or to any act which may be termed "misconduct," and converted into a cause of divorce by the legislature of any State. In Schiffer *v.* Pruden, 64 N. Y. 47, 49, this court, referring to said provision of the Revised Statutes, said that "the misconduct there spoken of must be her adultery; for there is no other cause for a divorce dissolving the marriage contract." It had before said, in Pitts *v.* Pitts, 52 N. Y. 593, that "a wife can only be barred of dower by a conviction of adultery in an action for divorce, and by the judgment of the court in such action." While these remarks were not essential to the decision of the cases then under consideration, they suggest the real meaning and proper application of the word "misconduct," as used in the Revised Statutes, with reference to its effect upon dower. When the legislature said, in the chapter relating to dower, that a wife should not be endowed when divorced for her own misconduct; and, in the chapter relating to divorce, that she should not be entitled to dower when convicted of adultery — the sole ground for a divorce, — we think that, by misconduct, adultery only was meant, or that kind of misconduct which our laws recognize as sufficient to authorize a divorce. The sections relating to dower, and to the effect of divorce upon dower, are *in pari materia*, and should be construed together; and, when thus construed, they lead to the result already indicated. Beebe *v.* Estabrook, 79 N. Y. 246, 252. The repeal of section 48, which provided that the wife, if convicted of adultery, should not be entitled to dower, has not changed the result, as sections 1759 and 1760 of the Code have been substituted, leaving the law unchanged. They enact in effect, that when judgment is rendered at the suit of the husband dissolving the marriage for the adultery of the wife, she shall not be entitled to dower in any of his real property. There is no change in meaning; and the slight change in language, as the commissioners of revision reported, was to consolidate and harmonize the new statute with the existing system of procedure. Throop Anno. Code, § 1760, note. The repealed section was pronounced in the Ensign Case, 103 N. Y. 284; 8 N. E. Rep. 544, "an unnecessary and superfluous provision as respects dower." It was also held in that case that while the relation of husband and wife, both actual and legal, is utterly destroyed by a judgment of divorce so that no future rights can thereafter arise from it, still existing rights, already vested, are not thereby forfeited, and are taken away by only special enactment as a punishment for wrong. It follows that depriving a woman of her right to dower is a punishment for a wrongful act perpetrated by her. Is it prob-

able that the legislature intended to punish as a wrong that which it had not declared to be wrong? If a divorce granted in another State for willful desertion relates back so as to affect, by way of punishment, property rights previously acquired, must not a divorce for incompatibility of temper, or any other frivolous reason, be attended with the same result? Does the penalty inflicted upon the guilty party to a divorce granted in this State for a single and special reason attach to any judgment for divorce, granted in any State for any cause whatever, including, as is said to be the law in one State, the mere discretion of the court? Our conclusion is that as nothing except adultery is, in this State, regarded as misconduct with reference to the subject of absolute divorce, no other misconduct is here permitted to deprive a wife of dower, even if it is the basis of a judgment of divorce lawfully rendered in another State, unless it expressly appears that such judgment has that effect in the jurisdiction where it was rendered, and as to that we express no opinion. The judgment should be reversed, and a new trial granted, with costs to abide event. All concur, except Follett, C. J., dissenting.

Wife's Renunciation of Dower of no Effect, if Husband's Conveyance is Invalidated for any Purpose.

Hinchliffe *v.* Shea, 103 N. Y. 153; 8 N. E. 477.

ANDREWS, J. The joinder by a married woman with her husband in a deed or mortgage of his lands does not operate as to her by way of passing an estate, but inures simply as a release, to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterwards claiming dower in the premises, as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance. But it is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. Robinson *v.* Bates, 3 Metc. 40; Malloney *v.* Horan, 49 N. Y. 111; Ketzmiller *v.* Van Rensselaer, 10 Ohio St. 63; Littlefield *v.* Crocker, 30 Me. 192.

In short, the law regards the act of the wife joining in the

deed or mortgage not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee of her husband in and of the title or interest created by his conveyance. It follows, therefore, that her act in joining in the conveyance becomes a nullity whenever the title or interest to which the renunciation is incident is itself defeated. Scrib. Dower, c. 12, § 49. The wife's deed or mortgage of her husband's lands, cannot stand independently of the deed of her husband, when not executed in aid thereof, nor can she by joining with her husband in a deed of lands to a stranger, in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right. Marvin *v.* Smith, 46 N. Y. 571.

These principles are, we think, decisive of this case. The plaintiff's mortgagee has been defeated by the paramount title derived under the execution sale. It was the husband's mortgage, and not the mortgage of the wife, except for the limited and special purpose indicated. The lien of the mortgage, as a charge on the lands of the husband has, by the execution sale, been subverted and destroyed; nor can the security be converted into a mortgage of the widow's dower, now consummate by the death of her husband. This would be a perversion of its original purpose. Her act in signing the mortgage became a nullity on the extinguishment of the lien on the husband's lands. If on the execution sale there had been a surplus applicable to the mortgage, it might very well be held that the widow could not be endowed therein, except after the mortgage had been satisfied. The surplus would represent in part the mortgaged premises. See Elmendorf *v.* Lockwood, 57 N. Y. 322.

We think the authorities require a reversal of the judgment. Judgment reversed, and the complaint dismissed with costs.

(All concur, except Miller, J., absent.)

Widow's Quarantine.

McKaig *v.* McKaig, 50 N. J. Eq. 325; 25 A. .

PITNEY, V. C. The bill is by a brother against brothers and sisters, asking for partition of land which descended to them from their father, George McKaig, deceased. There is no dispute as to the shares in which the land is held, and it clearly appeared at the hearing that it could not be divided without great prejudice, and so there must be a sale. The bill alleges that Charles P. McKaig, one of the defendants, has been in the exclusive possession, and has enjoyed the rents and profits, of

the premises from the death of the father, which occurred in February, 1879, up to the spring of 1888, a period of nine years, and had during that time cut and carried away therefrom, for his own use, a quantity of wood and timber; that such possession by Charles was had by virtue of an agreement or understanding with the other heirs that he should pay an annual rent of $150 therefor, and that the widow of George McKaig was entitled, as dowress, to one-third of the rents and profits; and it prays that an account may be taken of such rents and profits, and Charles be decreed to pay two-thirds of the same, or that the same may be deducted from his share of the proceeds of the sale of the land. Charles McKaig only has answered, and he denies that he occupied the premises under any agreement or understanding with his brothers and sisters, but alleges, in substance, that he entered and kept possession as the tenant of the widow, who was entitled to such possession and to the rents and profits until her dower was assigned to her, which was never done.

The serious and important question in the case is whether the widow of George McKaig, who died seised, was entitled to the exclusive possession and use of the premises in question under the second section of the dower act (Revision, p. 320), which enacts that, "until such dower be assigned to her, it shall be lawful for the widow to remain in and hold and enjoy the mansion of her husband, and the messuage or plantation thereto belonging, without being liable to pay any rent for the same." The facts are as follows: The widow, Sarah McKaig, owned in her own right a farm, upon which was a dwelling and the ordinary outbuildings, and in and upon which she resided with her husband for many years before and at the time of his death. This was their only home and mansion. Immediately adjoining this farm of the wife — the dividing line running near the buildings — were situate the lands in question, belonging to the husband. They comprised plow, meadow, and wood land, the proportion of plow land being small, and containing 148 acres in three parcels of 98, 33, and 17 acres, respectively, of which, however, only the larger one adjoined the wife's farm. The husband worked and used these lands in common with his wife's lands, making no distinction. There was no dwelling or other buildings upon them.

The question is, was the widow entitled to quarantine in them? I can find no judicial expression or decision on the point. The industry of counsel was unable to cite any. Nevertheless, I think the question reasonably free from doubt. There is here no "mansion house of the husband," and without it I am unable

to perceive how there can be any statutory quarantine. It is the messuage or plantation belonging "thereto," — that is, to the mansion house of the husband, — of which the widow is given the exclusive right until her dower is assigned. The statute does not give her such right in the messuage and plantation of her husband belonging to and used with her own mansion. The words "belonging to," as here used, clearly indicate uniformity of title, as well as contiguity of location and community of use. The right given by this enactment is greater than that enjoyed at the common law. It is not a declaration of what the law was, but a decided change in it; and, while our courts have manifested a disposition to construe this section favorably towards the widow, I can find in such disposition no warrant for changing what seems to me to be the plain meaning of the language used. I think the widow was not entitled to the exclusive use of these lands, and hence that the son, who was in possession, must account for two-thirds of the rents and profits.

With regard to the amount of rents and profits, the proof shows that the defendant Charles moved into the mansion house with his mother immediately after his father's death. His mother was far advanced in years, and infirm, and was, besides, at the time, quite ill from some temporary disorder, from which, however, she so far recovered as to live eight or nine years. The complainant and his brothers and sisters other than Charles understood and supposed, and there was evidence tending to show, that Charles entered under an agreement and understanding that he was to pay rent at the rate of $150 per year for the whole farm, including both the parts belonging to his mother and that belonging to his father, and that the same should be applied to the support of his mother during her life; in other words, that he was to support his mother for the use of both farms, and his brothers and sisters supposed that this was the arrangement until after the mother's death, when, to their surprise, Charles made a claim against her estate for a large sum ($1,314), for her support and maintenance from her husband's death, and this claim, after litigation in the orphan's court, was sustained, and Charles received payment therefor without any allowance for the use of either farm. This result could only have been arrived at on the ground that the arrangement and understanding upon which the other heirs supposed that Charles was occupying these premises had no legal existence, and the heirs are therefore free to demand an account of the rents and profits in this suit. Much evidence was given as to the annual value of the land here involved. It would be profitless to discuss it.

The amount involved is trifling, and I will simply state the result at which I have aarived. I find the value of the use of the land here in question to be $36 a year over and above taxes, and the defendant must account for two-thirds of that sum, or $24 a year for nine years, making $216. The wood cut by him I find to be worth $25. He should pay interest on these sums from April 1, 1888. The defendants did not set up the statute of limitations. I think the defendants, other than the complainant, though they have not answered or filed cross bills are entitled to the benefit of this adjudication, although, strictly speaking, made only upon complainant's prayer. The practice in partition cases does not require that each party should assert his rights by a separate pleading. To require them to do so would greatly increase the cost of the proceedings.

Assignment of Dower Against Common Right.

Jones *v.* Fleming, 104 N. Y. 418; 10 N. E. 693.

EARL, J. The plaintiff commenced this action to recover dower in certain lands mentioned in the complaint, as the widow of James Jones, deceased, against his children and heirs at law. The defendants interposed as a defense to the action that, at the time of plaintiff's marriage with Jones, she had another husband living, and also that she had released, and agreed to release, any dower right that she had in the land. Upon the trial before the referee appointed to hear and determine the action, it appeared that the plaintiff was married to one Firth in 1855; that she lived with him as her husband until 1861, when they broke up housekeeping, and never thereafter lived together; that in October, 1875, claiming that Firth had absented himself from her more than five successive years, without being known to her to be living during all that time, she married Jones; and that he died on the 28th day of October, 1880, seised of the lands in which she claims dower.

The defendants gave evidence tending to show that Firth had not absented himself, within the meaning of the statute (3 Rev. St. [7th Ed.] 2332, § 6), for five successive years, and claimed that her marriage with Jones was therefore null and void. They also offered to prove certain proceedings instituted in the Supreme Court in 1877 for the purpose of having Jones declared a lunatic, and for the appointment of a committee of his person and estate. The records of those proceedings show that the jury summoned for that purpose found him to be a lunatic since the fifteenth day of June, 1877, and incapable of government

of himself and the management of his estate; that there was a final order entered February 9, 1878, confirming the inquisition of the jury, and appointing William H. Miller committee of the person and estate of Jones; and that the committee qualified by giving the requisite bond. The records in those proceedings were objected to by the plaintiff's counsel as incompetent and immaterial and were excluded by the referee. The defendants also offered in evidence a petition dated February 15, 1878, by Miller, the committee, addressed to the Supreme Court, which alleged, among other things, that while Jones was a lunatic he was induced by the plaintiff to deliver to her bonds, notes and other choses in action amounting in the aggregate to $9,000; that she afterwards transferred and delivered some portions of the property to divers other persons; and that she had delivered between $500 and $1,000 of such property to one Leavitt who then held the same; and he prayed for an order authorizing him to commence an action against the plaintiff to annul her marriage with Jones, and also actions against her and Leavitt and other persons who might have any of the personal property of Jones in their possession to recover the same. They also offered in evidence an order of the Supreme Court made February 25, 1878, authorizing the commencement by the committee of the suits mentioned in the petition; a summons and complaint in an action wherein Jones, by his committee, was plaintiff, and this plaintiff was defendant, to annul her marriage with Jones; the answer of the defendant in that action; a summons and complaint in the Supreme Court in an action by Jones, by Miller as committee, against the present plaintiff, commenced March 1, 1878, which complaint, among other things, alleged that Jones was the owner of personal property of the value of about $3,000; that his committee was entitled to the possession of the property, and that she declined to deliver the property to the committee, and unlawfully detained the same from him, and demanded judgment for the recovery of the property; also the defendant's answer in that action, in which she admitted that she had possession of the property, but alleged that it had been given to her by Jones, and that she was the owner thereof; also a summons and complaint in an action in the Supreme Court by Miller, as committee of Jones, against Leavitt, commenced March 15, 1878, which complaint alleged that Jones was the owner of personal property of the value of $500, which the committee was entitled to the possession of, and that Leavitt had converted the same, and demanded judgment for the value thereof; also the answer of Leavitt, which admitted that he had possession of the property, but alleged that the same had been

delivered to him by Mrs. Jones, and that she was the owner thereof; also a summons and complaint in an action in the Supreme Court, by Miller, as committee of Jones, against one Standring, commenced March 15, 1878, which complaint alleged that Jones was the owner of personal property of the value of about $4,000, which the committee was entitled to the possession of, that Standring had possession of the same, and declined and refused to deliver the same to the committee, and it demanded judgment for the recovery of the property; and also the answer of Standring, in which he alleges that the property had been left with him by Mrs. Jones for safekeeping, and that the same was owned by her. The plaintiff objected to all the evidence thus offered as incompetent and immaterial, and the referee sustained the objection.

The defendants then offered in evidence an agreement dated January 28, 1880, between the plaintiff, of the one part, and Ida V. Fleming, Ellen A. Van Ness, and Julia E. Zoller, described as the only children and prospective heirs of James Jones, a lunatic, and William H. Miller, a committee of the other part, which recited and stated as follows: "That, whereas, four suits have been commenced and are now pending in the Supreme Court, brought by said committee against the party of the first part, Mrs. Jones, and against persons representing her claims, as follows, to wit, [here the suits above mentioned are described] it having been this day agreed between the parties that all of the said actions be discontinued, and the same having been discontinued, the said committee and said three daughters of James Jones have stipulated and agreed that of the property involved in said suits the sum of $3,400 shall be released to and is hereby delivered to said Gazena C. Jones, the receipt whereof is hereby confessed and acknowledged, and a general settlement being made this day between all the parties hereto, now, therefore, in consideration of the premises, and of the said $3,400 duly paid to me, I hereby release, transfer, assign, and set over to the said committee, and said three daughters of said James Jones, all my right, title, and interest, including my inchoate right of dower (if any such exists), of, in, and to any and all real estate that said James Jones had on the twelfth day of October, 1875, or that he has since acquired, and also of, in, and to all his personal estate, and of, in, and to any personal estate he may own at his death; the intent being to release all right, inchoate or otherwise, that I have or may have in the estate of said James Jones; and in consideration of the premises, and of the said $3,400, hereby covenant and agree to and with said committee, and the three daughters of said James Jones before

named, that at any future time, on demand of the parties thereto, I will execute and deliver such further or other deeds, releases, or transfers as may be necessary to perfect this arrangement, and carry out the intention of the parties thereto, namely, the full and perfect release of all my inchoate or other rights in the property of said James Jones; and I hereby relinquish to said Miller, the committee, all rights that I now have, as the committee of the person of the said Jones, and agree to give full possession of the house and premises where I now am, on Monday, February 2, 1880." This was signed by Mrs. Jones, and acknowledged on the same day. The defendants also offered in evidence a quitclaim deed dated and acknowledged on the same day from plaintiff to the three children and to Mrs. Miller, the committee, in which she released to them all her right, title, and interest in and to all the personal property of Jones that came into her possession at any time prior to the date of the instrument, except such articles as were brought to Jones' house by her, or bought with her own money; and she released, assigned, and transferred to them, and their heirs and assigns, all the interest which she had, or might hereafter have, including any inchoate right of dower in any land to which Jones had title; and she also released to the parties of the second part any contingent interest in any personal estate which Jones might own at his death; and she covenanted with the parties of the second part not to make any claim therefor on the death of Jones, and that she would in the future, on demand of any one interested, make such further deeds, conveyances, or transfers as might be necessary to carry out the true intent and object of the parties, namely, to release all right, inchoate or otherwise, which she had or might have in any property which Jones might have at the time of his death; and she acknowledged that the instrument was made as a part of the general settlement which appeared by the agreement bearing even date with the deed, and signed by her. She also agreed to give up the possession of the house on and before the Monday following, together with all appurtenances thereto belonging. The defendant then offered in evidence a stipulation of the respective attorneys in the four actions mentioned in the agreement, discontinuing the same, without costs, as against each other, also dated January 28, 1878. The plaintiff objected to the agreement, the deed, and stipulation as immaterial and incompetent, and the referee sustained the objection, and excluded the evidence.

The defendants then offered to prove that, after the time specified in the inquisition that Jones became a lunatic, the

plaintiff wrongfully obtained from him over $7,000 worth of personal property, a portion of which she transferred to Standring and Leavitt; that an action was brought against her in the name of Jones by his committee to set aside her marriage with Jones; that actions were also brought by the committee of Jones against her, Standring, and Leavitt, to recover the personal property so obtained by her from Jones; that, during the pendency of those actions, a settlement was made between Miller, the committee of Jones, and all of the children and prospective heirs of Jones, and the present plaintiff, whereby such actions were all discontinued, and Miller, as such committee of Jones, and the children and prospective heirs of Jones, paid to the plaintiff $3,400, which constituted upward of one-third of the real and personal property of Jones; that the plaintiff, in consideration of the same, executed and delivered the releases and agreements before offered in evidence, and delivered the custody of Jones to the committee, and thereafter never lived with him; that Jones never recovered, and died intestate; and that, at the time the plaintiff obtained possession of the personal property, he was in fact a lunatic. The plaintiff objected to this evidence as immaterial and incompetent, and upon other grounds. The referee sustained the objections, and excluded the evidence.

The defendants then offered to prove that Jula E. Zoller, one of the original defendants, since deceased, after the settlement before mentioned, took charge of Jones, her father, and cared for and supported him until his death, on the faith of the settlement. This evidence was also objected to, and the objection was sustained by the referee.

In his report the referee found that the plaintiff's marriage with Jones was valid, and that she was entitled to dower in his estate, and judgment was entered in her favor upon such report, which, upon appeal to the general term, was affirmed.

Whether the first husband of the plaintiff absented himself, without being known to her, for five successive years, within the meaning of the statute, and whether, assuming that he did so absent himself, and the plaintiff was thus lawfully married to Jones, she became entitled to dower in his real estate, her first husband being alive at the time of Jones' death, we do not deem it important to determine, as there are other plain reasons which constrain us to hold that this most inequitable claim for dower should be defeated. It is provided in the Revised Statutes (3 Rev. St. [7th Ed.] 2198, § 12) that "if, before her coverture, but without her assent, or if, after her coverture, lands shall be given or assured for the jointure of a wife, or a pecuniary provision be made for her in lieu of dower, she shall make her elec-

tion whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both."

We must assume that the facts which the defendants offered to prove were true, and must dispose of the case on that basis. There was, therefore, within the meaning of this section, a pecuniary provision of $3,400 for the plaintiff in lieu of her dower. While it was not made by her husband, it was in his behalf, by his committee and children. No one has questioned that it was legally made, and while she holds the property, she cannot allege that it was not effectually made. This section does not in terms relate to a provision to take effect at the husband's death. Previous to the married woman's acts a pecuniary provision in lieu of dower could, during coverture, be made for a wife through the intervention of trustees, to take effect during the life of husband or at his death. The property could be placed in the hands of trustees, so that she could have the benefit and enjoyment of it during the coverture, or her enjoyment of it could be postponed until after her husband's death; and in either event it cannot be doubted that the provisions made came within purview of that statute. Since those acts the property constituting the provision under this section may be transferred or secured to the wife as her separate estate; and whether the possession and control of the property be at once given to her, or be postponed until her husband's death, it is still in every sense a provision within the meaning of this section.

If, by the word "provision," the law-makers meant a suitable portion of the husband's estate, or a suitable provision for the maintenance of the wife, or a provision to operate at the husband's death, then all the three conditions are complied with in this case. This provision was a suitable portion of the husband's estate, the property was placed in the absolute control of the wife, and hence could be used for her support and maintenance, and must have been so intended; and, as it was given to her in the form of choses in action but a few months before her husband's death, it may be presumed that she had it at his death.

The two following sections of the Revised Statutes must also be noticed. Section 13 provides that "if lands be devised to a woman, or a pecuniary or other provision be made for her by will in lieu of her dower, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will be endowed of the lands of her husband." Section 14 provides that "when a woman shall be entitled to an election under either of the two last

sections, she shall be deemed to have elected to take such jointure, devise, or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof." Under these sections the widow may make her election at any time within one year; and if she does not elect to take her dower within one year, she will be deemed to have elected the provision made for her in lieu of dower. But she may elect to take the provision at any time, and, when she has done so, her right to dower is barred. Here the plaintiff kept the pecuniary provision made for her, has never offered to return it, still has it, and must therefore be deemed to have elected to take and keep it in lieu of dower. She cannot have both the provision and dower; and therefore, when she began this action within less than two months after her husband's death, she had already made her election, and he right to dower was gone.

But there is still another reason for barring plaintiff's claim to dower. While, under the decisions of this State, the agreement and deed of January 28, 1880, could not operate as a present release of the plaintiff's inchoate right of dower, yet she was competent to enter into the agreement to execute a valid release of her dower after her husband's death. That agreement was based upon an adequate consideration. Three suits were pending which related to what she claimed to be her separate estate, and they were settled and discontinued, and choses in action valued at $3,400 were transferred to and received by her as her separate estate. Her agreement was therefore one by which she received a separate estate, and related thereto, and therefore was binding upon her under the married woman's acts, as has been frequently held in this and other courts of this State. Prevot *v.* Lawrence, 51 N. Y. 219; Herrington *v.* Robertson, 71 N. Y. 280; Cashman *v.* Henry, 75 N. Y. 103; Tiemeyer *v.* Turnquist, 85 N. Y. 516; Ackley *v.* Westervelt, 86 N. Y. 448. She received the choses in action in consideration of her agreement to release to these defendants her right of dower after the death of her husband, and her agreement was like the promise of a married woman to pay for property which she purchases for her own use, or adds to her separate estate. It is an immaterial circumstance that the defendants did not then own the land in which dower is now claimed, or the property which was transferred to her. They expected to be interested in the land as the heirs of their father, and were perfectly competent to make a contract for the benefit of the land at a future time when their interest should actually come

into existence. So, too, while they did not actually own the personal property, they were so situated that they were able to procure a settlement of the suits, and the transfer of the property to her; and so, even if the consideration was not at the time detrimental to them, it was beneficial to her, and ample to sustain her agreement based thereon. Certainly, so long as she retains the consideration which the defendants aided in securing to her, she cannot repudiate the agreement for which the consideration was furnished.

We know of no reason why such an agreement should not be enforced because it relates to dower, then inchoate, but expected to be complete at the death of the husband, when the agreement was to be performed. Such an agreement is condemned by no public policy. A married woman may bar her right to dower by a proper ante-nuptial or post-nuptial agreement, by accepting a provision made for her in a will, or by joining her husband in the conveyance of land in which her right of dower is inchoate. It is the policy of the law that a wife shall not be deprived of her dower except by her own consent; but it leaves her absolute freedom, in all the ways above mentioned, to bar her dower at her own will and pleasure.

The defendants, in their answer, among other things, demanded for relief specific performance by the plaintiff of her agreement to release her dower; and if the evidence erroneously excluded by the referee had been received, they would, if necessary for their protection, have been entitled to such relief.

Our conclusion, therefore, is that the judgment should be reversed, and a new trial granted; costs to abide the event.

All concur.

Lex Loci Rei Sitae Governs Effect of Testamentary Provisions in Lieu of Dower.

Staigg *v.* Atkinson, 144 Mass. 564; 12 N. E. 354.

Holmes, J. This is an action brought by a widow to recover one-third of the proceeds of land in Minnesota, formerly belonging to her husband, and sold without prejudice. The defense is that she is barred by having accepted the provisions of her husband's will. The husband made a will while domiciled in Rhode Island, providing for the plaintiff, but not declaring the provision to be in lieu of dower, and then changed his domicile to Massachusetts, where he died. If he had died domiciled in Rhode Island, and the land had been situated there, the provisions of the will would not have prevented the plaintiff

from recovering dower; and it has been decided, in a case between the same parties, that the change of domicile did not affect her right in Rhode Island land. Atkinson *v.* Staigg, 13 R. I. 725. If he had been domiciled and had made his will in Minnesota, the plaintiff would have been entitled by statute to the one-third which she claims; and, as there is no statute to the contrary, the provisions of the will would not have put her to an election. Gen. Laws Minn. 1875, c. 40; In re Gotzian, 34 Minn. 159, 163, 164; 24 N. W. Rep. 920; Reed *v.* Dickerman, 12 Pick. 146, 149; Ellis *v.* Lewis, 3 Hare, 310. If, finally, the land had been situated in Massachusetts, and the will executed there, the plaintiff would have been compelled to elect between her dower and the will. Pub. St. c. 127, § 20; St. 1861, c. 164, § 1. So far there is no dispute between the parties.

On the foregoing statement, it is obvious that the defendant cannot prevail, unless the rule which would govern if the land lay here also governs the present case. It is contented that that rule does govern, on the ground that the Massachusetts statute is a statute of construction, reading a claim of universal application into the will, to the effect that the provision made for the widow is in lieu of dower, or substituted statutory interests in all lands, wherever situated, that the will is to be construed by the law of the domicile of the testator at the time of his death, and that if the will, so construed, makes an acceptance of its provisions a waiver of dower, etc., the law of Minnesota would enforce the election made by such acceptance. Washburn *v.* Van Steenwyk, 32 Minn. 339; 20 N. W. Rep. 324.

But we cannot admit that a rule of construction, properly so called, not known to the law of the party's domicile when he made his will, is necessarily to be imported into it by reason of his dying domiciled elsewhere. For purposes of construction it is always legitimate to consider the time when and the circumstances in which the will was made, and we think the law under which it was made was one of those circumstances. We are speaking only with reference to a case like the one before us, not to a question like that in Harrison *v.* Nixon, 9 Pet. 483, 504. The testator was at liberty to make his gift to his wife in lieu of or in addition to dower, as he saw fit. Which it should be, he had to consider, if he ever considered it, when he drew his will. He drew his will under a system by which the gift was in addition to dower unless he expressed the contrary, and he did not express the contrary. We are at a loss to see why his words should be held to acquire a new meaning upon his moving

into a State where testamentary gifts are in lieu of dower unless shown to be in addition to it. Atkinson *v.* Staigg, *ubi supra;* Holmes *v.* Holmes, 1 Russ. & M. 660.

In view of our construction of the Massachusetts statute, it is not necessary to consider what was the effect of moving into Massachusetts with regard to Massachusetts land. The plaintiff has never made any claim upon it. See Shannon *v.* White, 109 Mass. 146. Neither need we pass upon the plaintiff's argument that the general laws of Minnesota should be accepted here as determining the construction of the will, so far as concerns the effect of accepting its provisions upon the plaintiff's right to Minnesota land. It would follow from that argument that the plaintiff would have been barred of her dower in the Massachusetts land even if the testator had not moved from Rhode Island.

The case of Jennings *v.* Jennings, 21 Ohio St. 56, relied on by both sides, was the case of a West Virginia will giving the wife certain interests in land in Ohio, and it was intimated that with regard to Ohio lands she was put to her election between the will and her dower, although West Virginia preserved the common law rule allowing her to claim dower in addition to what was given by the will. We understand this case to go on the ground that the law of the place of the land given to the widow by the will was to determine whether she was put to an election or not, at least with regard to land in the same jurisdiction, claimed outside the will. Thus construed, the case helps neither party. The case of Washburn *v.* Van Steenwyk, 32 Minn. 336, 20 N. W. Rep. 324, which was put in evidence, is opposed to the plaintiff's contention. See Van Steenwyck *v.* Washburn, 59 Wis. 483, 510; 17 N. W. Rep. 289.

But we need not pursue this branch of the case further, because, in our opinion, the Massachusetts statute does not purport to affect lands outside of the State either by way of construction or otherwise. The language of Pub. St., c. 127, § 20, is as follows: "A widow shall not be entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears to have been the intention of the testator." In St. 1861, c. 164, § 1, the language is: "If she makes no such waiver, she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." Both of these acts in form are directed at dower, not at the construction of wills. The statute gives the widow dower (Pub. St., c. 124, § 3; Rev. St., c. 60, § 1), and allow her six months in which to waive the provisions made for her by the will (Pub.

St., c. 127, § 18; St. 1861, c. 164, § 1; Rev. St. c. 60, § 11). They then go on to say that she cannot have her dower unless she waives the will, but add that the husband may make his bounty an addition to her dower if he sees fit. No doubt the statute was intended to change the common-law rule. But the fact that it approaches the subject from the side of dower, and not from the side of the will, shows that it was only intended to operate with regard to Massachusetts lands, whether described as a statute of construction or as a statute relating to dower. Of course, Massachusetts would not attempt to legislate concerning dower in another State. Taking the view which we have expressed, we have not considered whether the satutory one-third in fee given by the law of Minnesota would be included under the word "dower" in our statute.

It was suggested for the defendant that the widow could not claim under the will in one jurisdiction, and against it in another. But, on one construction of the will and the Massachusetts statute, she does not claim against the will by claiming her third of the Minnesota land outside of it.

We are of opinion that the plaintiff's interest is bound to contribute to the payment of debts secured by mortgage upon the Massachusetts lands. By the old law until changed in England by St. 17 and 18 Vict., c. 113, if other land was charged with the payment of debts, it had to exonerate land which the testator had mortgaged. And this rule was not based upon the fact that the devise of the mortgaged land was specific, as it would have been even if residuary, or upon any notion of the intention to be drawn from the will. Undoubtedly, land not passing by the will, but acquired and mortgaged after the will was drawn, would have been exonerated. The rule was put upon the ground that the debt was a general debt, like any other, and the mortgaged land only a security, and therefore that the funds liable for general debts must pay it. Bartholomew *v.* May, 1 Atk. 487; Tweedale *v.* Coventry, 1 Brown Ch. 240; Serle *v.* St. Eloy, 2 P. Wms. 386; Hewes *v.* Dehon, 3 Gray, 205, 207; Plimpton *v.* Fuller, 11 Allen, 139. It followed that, when other land and the mortgaged land were both charged together, they were held to contribute ratably (Carter *v.* Barnadiston, 1 P. Wms. 505; Middleton *v.* Middleton, 15 Beav. 450; Harper *v.* Munday, 7 De Gex, M. & G. 369); and the same principle would apply when all the lands are charged by statute, instead of by will.

By the Minnesota statute, the plaintiff's interest is "subject, in its just proportion, with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate;" so that, apart from the will, the plaintiff's one-third

would stand no better than the other two-thirds. Taking into account this and the general course of legislation which makes land liable for debts, we think that it would be too artificial to interpret the testator's general direction to pay debts as indicating an intent to charge the interests passing by the will in exoneration of the plaintiff's one-third, even as against residuary devisees. Hewes *v.* Dehon, *ubi supra.* See Harris *v.* Watkins, Kay, 438. Although we assume that the residuary devise was not specific, so far as it affected the Minnesota land, as it was not with regard to the land in Massachusetts (Blaney *v.* Blaney, 1 Cush. 107; Thayer *v.* Wellington, 9 Allen, 283, 296), the plaintiff prevails upon a somewhat technical principle, and hardly can complain if she is held to stand upon the footing on which the Minnesota statute meant to put her.

Judgment for plaintiff for $2,205.69.

SECTION IV.

HOMESTEAD.

Warren *v.* Warren, 148 Ill. 641; 36 N. E. 611.
Ingels *v.* Ingels, 50 Kan. 755; 32 P. 387.

Widow May Claim Both Homestead and Dower.

Warren *v.* Warren, 148 Ill. 641; 36 N. E. 611.

The original bill in this case was filed on September 24, 1890, by the appellant, Eliza A. Warren, the widow of Alpha Warren, who died testate on November 12, 1888, against John H. Warren in his own right as a son of Alpha A. Warren by a former wife, and as executor of the will of said Alpha Warren. Appellant was married to Alpha Warren on June 15, 1875, and was at that time a widow having a daughter by a former husband, but never had any children by Alpha Warren, his only child being said John H. Warren. After answer filed, the bill was amended by making the children of John H. Warren defendants. Subsequently, on October 4, 1892, a supplemental bill was filed by appellant against said John H. Warren and his children. The questions in the case arise upon the issues made by the answers to the supplemental bill and the replications to such answers. The supplemental bill prays for an allotment of dower and homestead, for an accounting by the trustee and executor, for a

disallowance of certain payments made by him for special assessments and special taxes levied against real property of the estate in Rockford, for removal of the trustee, and for general relief, etc. The answers deny that complainant is entitled to any of the relief asked for, and set up release and settlement by her, and payment to her and receipt by her of one-third of the balance of the rents and interests given to her by the will, etc. The decree of the circuit court finds that the will of Alpha Warren was admitted to probate on November 15, 1888; that John H. Warren entered upon the duties of executor and trustee thereunder; that complainant affirmed said will, and did not relinquish any of the provisions thereof, and is not entitled to either dower or homestead in the lands of her deceased husband; that the personal estate has been and will be exhausted in payment of widow's award, claims allowed and the compensation of the trustee to be allowed; that since the testator's death the city of Rockford has carried on proceedings by special assessment for the improvement of public streets and the construction of public sewers; that such assessments against the lands of the testator amount to $1,441; that complainant has been wrongfully charged with one-third thereof, to wit, $480.33; that under the will she is only charged with one-third of the ordinary taxes and repairs. The decree orders that John H. Warren, pay to complainant said sum of $480.33, with 5 per cent interest, and certain costs, within 40 days, etc., and have execution therefor, and that the question of the executor's compensation be reserved, etc.

The will of Alpha Warren appoints his son his "executor to settle and manage my estate, and also my trustee, to hold and keep my estate intact during his natural lifetime;" and, after providing for the payment of debts and funeral expenses out of the personal property, it proceeds as follows: "I direct that the annual income of my estate, personal and real, shall be used as follows: "My executor and trustee shall be entitled to and shall receive a reasonable compensation for his services. The annual taxes and insurance, and also all reasonable repairs and improvements, shall be provided for out of the annual rents and interests; and of the annual income not used for the purposes above named, one-third shall belong to my wife, Eliza A. Warren, during her natural life, and also a suitable house for her residence during the same period; and two-thirds of the above named income shall belong to my son, John Henry Warren, for the support of himself and family during his natural life. At the decease of my wife, Eliza A. Warren, the one-third of income belonging to her as

dowery shall revert to my estate for the benefit of my lawful heirs. Subject to the direction and control of the said John H. Warren, the trustee of my estate, and after the decease of both my wife, Eliza A. Warren, and of my son, John H. Warren, then my entire estate shall belong in equal values to the children of John H. Warren who shall survive him; said sum to be held in trust for each one until he or she shall be twenty-one years of age. My executors, after consulting with the probate judge, and both judge and executor shall decide that a sale or exchange of any of my real estate in the city of Rockford will benefit my heirs interested in said estate, such sale or exchange and reinvestment may be made with the approval of the probate court, but not otherwise. And my son, John H. Warren, and my wife, Eliza A. Warren, shall not be required to pay rent for the use of the residence that they shall occupy which shall be suitable for their respective families, but they are not to occupy the double houses that are arranged for different families at one and the same time as tenants." On November 27, 1888, appellant executed under her hand and seal an instrument by which, in consideration of the payment and approval of the award allowed her on that day, and for other goods and valuable considerations, she agreed with those interested in the estate as follows: "First. I, widow of said deceased, do hereby covenant and agree to accept the legacy and interest given in and by the last will of said deceased, my award, and the claim of $200 filed by me in said estate, in full of all claim to or right or interest in the estate, real, personal, or mixed, of said deceased, of every name and nature; and any other interest is hereby expressly waived and released to said estate." The appellant did not renounce the provisions of the will within one year after letters testamentary were issued. During December, 1888, and in each month in the years 1889, 1890, 1891, and 1892, she has received moneys from the trustee and executor out of the income of the estate. She was paid her widow's award, about $1,200, and the claim of $200 against the estate, which is above referred to.

N. C. Warner, for appellant. J. C. Garver and A. E. Fisher, for appellees.

Magruder, J. (after stating the facts). The first question arising upon the assignment of error is whether or not the appellant is entitled to have dower assigned to her in the lands of her deceased husband. Sections 10 and 11 of the present dower act, which was approved on March 4, 1874, and went into force on July 1, 1874, are as follows: (10) "Any devise of land, or estate therein, or any

other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts." (11) "Any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise or other provision, unless, within one year after letters testamentary of administration are issued, he or she shall deliver or transmit to the county court of the proper county a written renunciation of such jointure, devise or other provision." Section 13 prescribes the form of renunciation, by the terms of which the surviving husband or wife does thereby "renounce and quitclaim all claim to the benefit of any * * * devise or other provision made to me by the last will and testament of the said * * * and I do elect to take in lieu thereof my dower and legal share in the estate of the said * * *." As the appellant did not renounce the provisions of the will within one year after letters testamentary were issued to the executor of Alpha Warren's estate, it would seem to be clear that she had elected to take under the will, and that she is not entitled to an assignment of dower in the testator's land under the decisions of this court. Cowdrey *v.* Hitchcock, 103 Ill. 262; Stunz *v.* Stunz, 131 Ill. 210; 23 N. E. 407; Cribben *v.* Cribben, 136 Ill. 609; 27 N. E. 70.

It is contended by counsel for appellant that the acceptance by the widow of the provision made for her in the will will not bar her dower, unless such provisions shall be a reasonably adequate compensation for the loss of what she would have been entitled to under the statute if there had been no will. This contention is based upon the decision of the circuit court of the United States for the seventh circuit in the case of U. S. *v.* Duncan, 4 McLean, 99; Fed. Cas. No. 15,002, where a liberal construction was given to section 39, and 40 of the act of this State in regard to wills in force in 1829 (Rev. Laws, 1833, p. 624). But a comparison of sections 39 and 40 of the act of 1829 with sections 10 and 11 of the act of 1874 will show that the phraseology of the former is different from the phraseology of the latter. By the terms of said section 11, if the surviving husband or wife fails to renounce within the year, he or she shall be deemed to have elected to take the provision given by the will. The directions of the statute are explicit, and a compliance with them can work no harm

to any of the parties concerned. Section 10 directs that the devise or other provision made by the will shall be a bar to dower "unless otherwise expressed in the will." If, therefore, a husband desires to make, in his will, a provision for his wife, which shall not operate as a bar to her dower, he can therein state that such provision is not to be in lieu of dower, in which case she will take both her dower and what is devised or bequeathed to her. If the widow deems such devise or bequest an adequate compensation for dower, she can file her renunciation within the time specified, and thereby take what she is entitled to under the statute.

In the present case, however, we are not satisfied that the provision made for the appellant by the will is not a reasonably adequate compensation for her dower, if the doctrine of the Duncan case should be held to be applicable. It is conceded that the personal estate of the deceased testator has been exhausted in the payment of the debts and expenses of administration, and that no personal property would have passed to appellant if her husband had died intestate. All that she could have received in any event was dower in the lands. All that her dower, when assigned and set off, would amount to would be the right to use the one-third in value of her husband's lands, and draw the rents and profits thereof, during her life. The will, by directing that one-third of the annual rents and interest, after deducting certain expenditures, shall belong to her, gives her what is substantially equivalent to the value of her dower in the real estate. Counsel refer us to a number of cases which hold that the wife cannot be deprived of her dower by a testamentary disposition in her favor, so as to put her to her election, unless the testator has declared the same to be in lieu of dower, either in express words or by necessary implication. Under the rule laid down in most of these cases, the testator will not be presumed to have intended the provision in this will to be a substitute for dower, unless the claim of dower would be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat them. Adsit *v.* Adsit, 2 Johns. Ch. 448; Smith *v.* Keniskern, 4 Johns. Ch. 9; Wood *v.* Wood, 5 Paige, 595; Fuller *v.* Yates, 8 Paige, 325; Church *v.* Bull, 2 Denio, 430. The decisions referred to will be found, upon examination, to have been rendered in the absence of such statutory provisions as exist in this State, and such decisions are consequently inapplicable to the case at bar. The great object in construing the wills which the courts there had under consideration, was to ascertain the intention of the testator upon the question whether or not the testamentary

disposition was to be taken in lieu of dower. Even in the Duncan Case, *supra*, the reasoning of the court proceeds largely upon the ground that the testator will not be presumed to have intended his bequest or devise to be a substitute for dower if its amount or value is, to a very considerable extent, less than the amount or value of the dower. But under the peculiar terms of the Illinois statute, the provision in the will is declared to be a bar, unless the intention that it shall not be a bar is expressed in the will. The statute makes the silence of the testator the conclusive index to his intention, and it also makes the failure to renounce within a specified time conclusive evidence that the surviving husband or wife has elected to take under the will.

We think, however, that if the rules laid down in the authorities relied upon are applied to the interpretation of the will in this case, there will be disclosed an intention to make the testamentary provisions a substitute for dower, and not a gift in addition to it. Alpha Warren drew his own will, and he therein designates the portion of the "annual rents and interest" given to his wife as "one-third of income belonging to her as dower." If the one-third of the income specified in the will was to be her dower or "dowery," he could not have intended that she should have another dower outside of and in addition to that given by the will. Again, after directing that one-third of his net annual income shall belong to his wife, he directs that the other two-thirds thereof shall belong to his son, John H. Warren. If the wife was to have dower besides the third of the income given her by the will, the son could not take the two-thirds of the income therein devised to him. The widow, in such case, would virtually have two-thirds, and only one-third would be left for the son. It follows that the claim of dower on the part of the widow is inconsistent with the provisions made for the son in the will, and so repugnant to them that, if allowed, it would defeat them. A case might arise where the widow, in accepting the testamentary disposition, acted without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance. 4 Kent Comm., p. 58. It might then be necessary to determine whether the lapse of more than a year without renunciation would cut her off from the privilege of making her election. U. S. *v.* Duncan, *supra;* Cowdrey *v.* Hitchcock, *supra.* But here it appears that the widow was correctly advised as to her testamentary rights and her statutory rights and the value of the one as compared with the other.

Counsel further insists, that the dower of the appellant is not

barred because the devise is not to the wife, but to the executor in trust for her benefit. Under the English statute of uses a jointure was not available to bar the widow's dower, unless the settlement was to the wife herself, and not to any other person in trust for her. Van Arsdale *v.* Van Arsdale, 26 N. J. Law, 404. It has also been held that a devise of lands to trustees for the benefit of the wife does not necessarily indicate intention to defeat dower, as the trustee may take the lands subject to its legal incidents, that of dower included. Wood *v.* Wood, *supra;* Church *v.* Bull, *supra.* But the language of our statute is broad enough to include devises to trustees for the benefit of the wife, as well as those directly to the wife herself. It would be a narrow construction that would exclude a devise to a trustee from the meaning of the following words in section 10: "Any other provision made by the will of a deceased husband or wife for a surviving wife or husband." The use of the word "for" forbids a limitation of the meaning to devises made to the wife.

The next question is whether the appellant is entitled to have a homestead assigned to her. The will provides not only that there shall belong to the appellant one-third of the net annual income during her natural life, but "also a suitable house for her residence during the same period," and that she shall not be required to pay rent for the use of such residence. Since her husband's death she has continued to reside in the same house, belonging to her estate, in which she lived with him at the time of his death, and for several years prior thereto. Section 11, as above quoted, directs that any one entitled to an election under section 10 "shall be deemed to have elected to take such jointure, devise, or other provision, unless" there is a renunciation within the specified year. The provision which such person shall be deemed to have elected to take is the whole of the provision made for him or her in the will, and not a part of such provision. The devise elected to be taken will be the whole of the devise given, and not a part thereof. It follows that when appellant, by her failure to renounce, elected to take one-third of the net annual income for her natural life, she also elected to take therewith a suitable house for her residence during the same period. Hence her continued residence in the house where she and her husband lived when he died will be presumed to be in the exercise of the right thereto as given by the will, and not in the exercise of her statutory right of homestead. Stunz *v.* Stunz, *supra.* The statute gives a householder having a family as estate of homestead to the extent in value of $1,000, and continues such exemption after his death to his surviving

wife, so long as she continues to occupy the homestead. Rev. St., c. 52, §§ 1, 2. The will in this case does not limit the value of appellant's residence to $1,000, or any other amount, but only requires that the house shall be suitable for her residence. The residence provided for by the will is not the same as the homestead given by the statute. The general rule is that a person cannot accept and reject the same instrument. Birmingham *v.* Kirwan, 2 Schoales & L. 449; 2 Story Eq. Jur., § 1077, note 4. It is a maxim of equity not to permit the same person to hold under and against a will. Brown *v.* Pitney, 39 Ill. 468; Ditch *v.* Sennott, 117 Ill. 362; 7 N. E. 636. The appellant cannot accept the will as to dower and reject it as to the provision which it makes for a homestead or residence. Nor does the law contemplate that a householder can have two homesteads. Tourville *v.* Pierson, 39 Ill. 446. Appellant, having elected to take a house for her residence according to the terms of the will, cannot have a homestead set apart to her under the statute. It is true that a homestead under the statute is exempt "from the laws of conveyance, descent, or devise," except as therein provided; but where the testator directs in his will that his wife shall have a suitable house for her residence during her life without payment of rent therefor, and she accepts the provision of the will, she cannot insist upon her statutory right of homestead. Cowdrey *v.* Hitchcock, *supra*.

The next question arises upon a cross error assigned by appellees, and is whether the appellant is justly chargeable with malfeasance as trustee in discharge of certain special assessments levied upon real property of the estate for paving streets and putting in sewers. The will directs that "the annual taxes and insurance, and also all reasonable repairs and improvements, shall be provided for out of the annual rents and interest," before one-third of the annual income shall belong to the wife. It cannot be said that a direction to pay "annual taxes" is a direction to pay special assessments. A special assessment imposed for a special purpose has none of the distinctive features of the ordinary annual tax, which is imposed for some general or public object. Illinois Cent. R. Co. *v.* City of Decatur, 126 Ill. 92; 18 N. E. 315; *Id.* 147 U. S. 190; 13 Sup. Ct. 293. But we see no reason why the paving of a street in front of a lot, and the pulling down of a sewer therein, should not be regarded as "reasonable improvements." The improvement may be local as affecting the locality in which the property is situated, but is of special benefit to the particular property assessed, because it increases its value; not only the permanent value inuring to the benefit of the rever-

sioner, but also the rental value during the existence of the life estate. The widow must pay the taxes and charges upon the property assigned to her for dower. Peyton *v.* Jeffries, 50 Ill. 143; White *v.* Mayor, etc., 2 Swan. 364; Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407. In White *v.* Mayor, etc., *supra*, it was held that, where a lot had been assigned to a widow as part of her dower, the cost of paving the street in front of the lot was a proper charge against her. When dower is assigned, the widow becomes seised of a freehold estate for life in the portion allotted to her. She is in by relation from her husband's death, and is not of the seisin of her husband. 4 Kent Comm., §§ 61, 69. Standing in his place, she must be "subjected to the charges, duties and services to which the estate may be liable, in proportion, certainly, to her interest therein." Peyton *v.* Jeffries, *supra*. Here the appellant, being entitled to one-third of the net annual rents and interest during her life, may be regarded as a tenant for life. The tenant for life is bound, out of the rents and profits, to keep down all incidental charges upon the lands which accrue during the continuance of his or her estate, as for repairs, taxes, and the like. White *v.* Mayor, *supra*. A special assessment for paving and sewerage, as well as taxes and repairs, may be included in such incidental charges. If, under the terms of the will of Alpha Warren, the appellant cannot be charged with her proportionate share of the special assessments, then the appellee John H. Warren cannot, by the same construction, be charged with his proportionate share thereof. If such assessments are not to be paid out of the rents and interest, how are they to be paid? It is suggested that application can be made to a court of equity for leave to sell some of the land in order to raise the amount required; but the amount of appellant's income might be diminished by such a sale as much as it would be by paying the assessments out of the rents and interest; and, not only so, but a sale of a portion of the property for such a purpose would defeat the manifest intention of the testator, as disclosed by the clause of the will which directs "my trustee to hold and keep my estate intact during his natural lifetime." For the reason thus stated, we think that the decree of the circuit court was correct in holding that appellant was not entitled to dower and homestead, but was erroneous in holding that appellant was wrongfully charged with one-third of said special assessment, and in ordering that the executor and trustee should pay to the appellant the amount so charged to her. For this error the decree to the extent here indicated is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed.

Occupation Necessary to Claim of Homestead.

Ingels *v.* Ingels, 50 Kan. 755; 32 P. 387.

ALLEN, J. On the 22d day of June, 1889, defendant in error obtained a judgment in the district court of Atchison County, Kan., against T. J. Ingels and M. F. Ingels for the sum of $906.90 and costs of suit. On the 9th day of August, 1889, execution was issued on said judgment to the sheriff of Atchison county. On the 19th of August, 1889, said sheriff levied the same on lot 11, and the west 40 feet of lot 12, block 11, in that part of the city of Atchison, commonly known as "West Atchison." The sheriff duly advertised this property for sale, and on the 26th day of September, 1889, sold the same to the plaintiff below for the sum of $157. Motions were thereafter filed both to confirm and set aside said sale. These motions were heard at the same time. The motion to set aside the sale was overruled, and the motion to confirm was sustained. The defendants below excepted to the ruling of the court on these motions, and bring the case here for review.

Two points are urged by counsel for the plaintiffs in error. One is that the appraisement is defective, because the appraisement fails to state that the appraisers made an estimate of the real value of the property. The appraisement does state that the appraisers, being first duly sworn impartially to appraise the said property upon actual view, had truly and impartially appraised said property, and that the particular property in controversy was appraised at $150. We think this a substantial compliance with the statute. It is not necessary that the precise language of the statute be used in the report of the appraisers. We think that the appraisement in this case fairly shows that the property was appraised at what the appraisers deemed its real value. This is a substantial compliance with the requirement of the statute.

The principal question presented for our consideration is whether or not this property was a homestead, and therefore exempt from levy and sale. The facts with reference to the matter, as appears from the record, are as follows: The plaintiffs in error formerly owned and occupied a homestead in West Atchison, which they sold in the year 1887, expecting and intending at the time to reinvest the proceeds in another homestead. Soon thereafter they invested a part of the proceeds of this sale in the property in controversy, for the purpose and with the intention of making it their permanent homestead. At the time of the purchase there was no house or other building thereon, and the same was not inclosed. They

inclosed the lots with a fence, and, as fast as they were able, proceeded to and had hauled on said lots materials, stone, lumber, etc., with which to build a dwelling-house and building to occupy as a homestead. Milliard F. Ingels then took a contract at Valley Falls to bore for coal, and temporarily moved to Valley Falls, to be near his work, and intending to return to his homestead, complete his dwelling-house, and occupy the same as his permanent homestead. While he was still engaged on his contract at Valley Falls, and before he had completed the same, on the 19th day of August, 1889, the sheriff levied said execution on said property, and sold the same as before stated. The plaintiffs in error have no other homestead, and no other real estate of which to make a homestead. After the levy the defendants below built a house on said lots, which they occupied at the time of the sale. The defendants never occupied the premises in question from the time they were purchased by the defendants, in March, 1887, till after the making of the levy thereon; and at the time said judgment was rendered and at the time the levy was made, the said premises were vacant and unoccupied, excepting that they were inclosed by an old fence. The facts in this case are to be gathered from the affidavit made by both plaintiffs in error, and also from an agreed statement of the facts made by both parties, and included in the record. The statements with reference to the placing of building materials on the lots are contained in the affidavit. From the agreed statement it appears that the defendants never occupied the premises in question from the time they purchased them to the time of the levy, and that at the time the judgment was rendered and at the time of the levy the premises were vacant and unoccupied, except that they were inclosed by an old fence. We can only harmonize the facts gathered from the affidavit with those contained in the agreed statement of facts by concluding that whatever building materials had been placed on the lots were removed therefrom before the levy was made. It clearly appears from the whole record that the premises were never in fact occupied by the defendants as a homestead, and also that at the time the judgment was rendered and the levy made the lots were vacant and unoccupied. The question is now presented for our consideration as to whether the purchase of this property for a homestead, and the intention in the minds of those parties to make it a homestead in the future, is sufficient to supply the requirement of occupancy contained in the constitution. Section 9, art. 15, of the constitution reads as follows: "Sec. 9. A homestead to the extent of one hundred and sixty acres of

farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from force sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." This section of the constitution has been considered and construed by this court in numerous cases. In the case of Edwards *v.* Fry, 9 Kan. 417, Mr. Justice Brewer, speaking for the court, used the following language: "We know the spirit which animates the people of Kansas, the making of our constitution and laws, on this homestead question. We note the care with which they have sought to preserve the homestead inviolate to the family. We have no disposition to weaken or whittle away any of the beneficent constitutional or statutory provisions on the subject. We know that the purchase of a homestead, and the removal onto it cannot be made momentarily contemporaneous. It takes time for a party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now, the law does not wait till all this has been done, and the purchaser actually settled in his new home before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability. Yet occupation is nevertheless an essential element to secure this inviolability." Again, in the case of Monroe *v.* May, *Id.* 466, it was held: "A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, receives from the time of purchase a homestead exemption from seizure upon execution or attachment." The facts in that case with reference to the occupancy are briefly these: Monroe, the judgment debtor, owned a farm, which he sold in November, 1870, receiving in exchange a house and lot in Atchison and $1,600 in notes. Possession, by agreement, was to be exchanged on the 1st of March following. The exchange was so made, and this city property was occupied and claimed by Monroe and wife as their homestead. The court in that case came to the conclusion that the Monroes became actual occupants of this property within a reasonable time after its

purchase, and that it was exempt to them as a homestead. The time intervening between the purchase and taking possession was four months or less. Again, in the case of Gilworth *v.* Cody, 21 Kan. 702, it appeared that Cody, on December 1, 1877, purchased 80 acres of land for the purpose of present use as a residence. The land was vacant at the date of the purchase. Cody commenced at once to dig a cellar, and haul stone for a dwelling house. On December 5th, he started to a neighboring town to purchase materials out of which to erect a dwelling house. He made such purchase, and returned with the materials on December 7th. He unloaded the materials adjoining the premises on the same day the premises were levied on under the order of attachment. Cody continued the construction of his dwelling house, and completed the same December 28, 1877, and moved at once with his family into the dwelling, and occupied it as the residence of himself and family. Chief Justice Horton, in delivering the opinion of the court, used the following language, after having reviewed the authorities on the subject: "These decisions clearly establish the doctrine that our homestead laws, beneficial in their operation, and founded in a wise policy, should be liberally construed, so as to carry out their spirit. Considered in this light, in this case there was such an actual purpose and intention of present occupancy, accompanied with such acts on the part of the defendant in error in the commencement and completion of his dwelling, together with his residence therein with his family, that this might reasonably be held to amount in substance to actual occupancy at the date of the levy. While, therefore, we hold, within the terms of the law, that occupation is an essential element to secure a homestead inviolability, under the exceptional circumstances which appear from the findings of the court, the intentions and acts of the purchaser of the land in controversy may be construed into a legal equivalent of actual occupancy of such premises. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs; and the construction we have given above to the provisions securing homestead exemptions is certainly within their spirit, and more in consonance with a reasonable interpretation thereof, than if we adopted the opposite conclusion."

Counsel for the plaintiffs in error calls our attention to the case of Reske *v.* Reske, 51 Mich. 541; 16 N. W. Rep. 895. The opinion in that case was delivered by Justice Cooley, and carries the doctrine of constructive occupancy for a homestead to the furthest limit yet reached by any court, so far as we have been able to review the authorities. It appeared in that case that the

defendant purchased the lot in controversy in Detroit in January, 1880. He was a single man at the time of the purchase, but soon thereafter married. He then fenced the lot and commenced making use of it. He built a barn and shed, dug a well, kept his horses, his hogs, and his poultry, and also piled wood, which he kept for sale, on the lot. At first he lived at some considerable distance, but afterwards took board across the way, and remained there while building. In the spring of 1881 he obtained figures from a builder on the cost of a house, but, not being able to go on, he did not then build. It was towards the end of 1882 before they were able to put up a house, and they were not living in it till 1883. In November, 1882, judgment was taken against the defendant, and execution levied on the lot. The court in that case comments on the fact that the defendant was all the time in actual occupancy of the lot, and was, from time to time, doing various acts tending towards the construction of such buildings and conveniences as were required in order to make it a home. The period of time intervening between the purchase of the lot and the levy of the execution was a few months longer than in this case. It will be noted, however, that in this case it is expressly admitted that there was not at any time actual occupancy of the premises by the defendant from the time of the purchase till the date of the levy. In that case the defendant testified, and the court quotes from his testimony the following language: "I built every day as soon as I got a little money ahead." The court evidently took the view of the case that the defendant's delay in the construction of his dwelling house was due solely to his poverty, and that he was all the time making a determined effort to actually fit the premises for occupation by himself and family. He not merely had the purpose in his mind to make the lot his homestead, but was actually at work, from time to time, on the lot, preparing it for a home. In the case of Swenson *v.* Kiehl, 21 Kan. 533, the syllabus of the case is as follows: "(1) Homestead occupation. Occupation, actual or constructive, is essential to give the character of homestead to premises. (2) * * * Intent when purchased. While occupation need not always be instantaneously contemporaneous with purchase to create a homestead, yet the purchase must always be with the intent of present, and not simply of future, occupancy." In that case the land was purchased by the execution debtor on November 13, 1879. The judgment on which the execution was issued was rendered in 1873. One execution was issued February 5, 1877, and another February 23, 1877. The sale was made under the latter execution. There was a house on

the land, but the defendant failed to occupy it as a residence for more than a year after the purchase, and in that case Mr. Justice Brewer, in the opinion, says: "'Occupied as a residence by the family of the owner,' is the language of the constitution defining a homestead exemption. We are aware that occupancy is not always possible at the instant of purchase, and that, as we have heretofore said, a reasonable time is allowable in which to prepare for and to complete the removal and occupation of the intended homestead, but the purchase must be for the purpose and with the intent of present, and not simply of future, use as a residence." In the case of Farlin *v.* Sook, 26 Kan. 398, it was held "under the homestead exemption laws no person can hold property exempt from execution or forced sale unless the property is 'occupied as a residence by the family of the owner.' Therefore, where the owner of the property resides upon the same, but his family, consisting of a wife and children, have never been in Kansas, but reside in Illinois, and it is not, and never has been, the intention of the owner to bring them to Kansas, or to have them reside upon the property, held, that the owner cannot hold the property exempt from execution and forced sale under the homestead exemption laws." In the case of Koons *v.* Rittenhous, 28 Kan. 359, it appeared that a husband and wife resided in New York in 1871. The husband, desiring to change his place of residence, came to Kansas, and purchased real estate, and resided thereon for about four years, then sold the same, and executed a deed therefor, representing himself to be a single man. About a year afterwards the wife came to Kansas, and thereafter resided upon the land with her husband, and it had been at all times the intention of the husband and wife that she should at some time come to Kansas, and reside upon the land with him. It was held that the land had never been occupied as a residence by the family of the owner in accordance with the exemption law, and that the deed from the husband alone was therefore not void. Again, in the case of Bradford *v.* Trust Co., 47 Kan. 587; 28 Pac. Rep. 702, in concluding the opinion, Chief Justice Horton says: "Under the constitution, there must be occupancy as a residence by some one of the family of the owner to constitute a homestead."

We do not think there is any real conflict in the authorities cited, nor do we think that the Michigan case goes to the limit which the plaintiff in error asks us to reach in this case. Whatever our views might be as to the propriety of allowing a debtor to hold a tract of land for a homestead, whether occupied or not, we are bound to declare the law as we find it, and, while this court in the cases cited has given the constitutional

provision a liberal construction for the purpose of fully securing to needy debtors the beneficent exemption secured to them by the constitution, yet we may not wholly dispense with the requirement of occupancy. Can it be said that these lots, though vacant and wholly unoccupied for a period of more than two years, were in the constructive occupancy of the defendants, because they were purchased with the proceeds of a former homestead, and the defendants intended, as soon as they should be able to build thereon, to occupy them. If we hold these lots to have been a homestead during all this time, by what course of reasoning can we ever fix a limit within which actual occupancy must take place? The admission contained in the record that the defendants never occupied the lots or premises in question herein from the time they were purchased by the defendants, in March, 1887, up to the time subsequent to the making of the levy herein (which was on August 19, 1889), and that at the time of the levy the premises were vacant and unoccupied, seems to us to be decisive of this case; and that the defendants have admitted that occupancy by the family of the defendants did not exist, and therefore the defendants cannot claim the premises exempt to them as a homestead. The fact that the defendants took possession of the lots and constructed a house thereon after the levy of the execution cannot of itself defeat the lien of the judgment. Bullene *v.* Hiatt, 12 Kan. 98. The rights of the parties were fixed at the time of the levy, and no subsequent act of the debtor could change them. We find no error in the rulings of the district court, and its orders will be affirmed. All the justices concurring.

CHAPTER VII.

SECTION I.

ESTATES FOR YEARS.

Syms *v.* Mayor of New York, 105 N. Y. 153; 11 N. E. 369.
Freeland *v.* Ritz, 154 Mass. 257; 28 N. E. 226.
Sexton *v.* Chicago Storage Co., 129 Ill. 318; 21 N. E. 920.
Doyle *v.* Un. Pac. Ry. Co., 147 U. S. 413.
Ingalls *v.* Hobbs, 156 Mass. 348; 31 N. E. 286.
Snow *v.* Pulitzer, 142 N. Y. 263; 36 N. E. 1059.
Stevens *v.* Pantlind, 95 Mich. 145; 54 N. W. 116.
Barlow *v.* Dahin, 97 Ala. 414; 12 So. 293.

Covenant for Renewal and the Rule of Perpetuity.

Syms *v.* Mayor of New York, 105 N. Y. 153; 11 N. E. 369.

Earl, J. On the 10th day of April, 1810, the city of New York executed to Peter Lorillard a lease demising to him certain

premises for a term of 30 years, ending on the first day of May, 1840. The lease was executed by both parties, and in it the city agreed that at the expiration of the term, to wit, May 1, 1840, it would demise the premises to him, his assigns, etc., "for and during the term of twenty-one years thereafter, with a like covenant for future renewals of the lease as is contained in the present indenture." On February 1, 1839, Lorillard assigned the lease to John Syms, who thus became substituted in his place. On the first day of April, 1840, the city executed a lease of the same premises to John Syms for another term of 21 years, in which it covenanted that at the expiration of that lease, to wit, May 1, 1861, it would again demise the premises, "in pursuance of this present lease, * * * for and during the term of twenty-one years thereafter, upon such rents as shall be agreed upon," or determined by two sworn appraisers and an umpire. On the twentieth of April, 1861, the city executed a third lease to John Syms for 21 years from May 1, 1861. That lease contained no covenant for renewal, and in it Syms covenanted that at the end of that term he would peaceably and quietly leave, surrender, and yield up to the city, or its successors or assigns, all of the demised premises. Syms died in 1868, having some years before his death erected a valuable building upon the premises. In April, 1880, the city sold the premises to John B. Haskin. Thereafter, in October, 1880, the plaintiffs, as executors of Syms, commenced this action, alleging in their complaint, among other things, the facts hereinbefore stated, and praying that the city be adjudged to reform the leases dated April 1, 1840, and April 20, 1861, by inserting therein a covenant for a further renewal of 21 years from May 1, 1882, and that the sale and conveyance to Haskin be set aside, and the plaintiffs be given a renewal lease for 21 years from May 1, 1882, or, if the defendants had put it out of their power to perform the covenant by having sold the premises, that they and Haskin be adjudged to pay the plaintiffs their damages by them sustained for the conversion of the building on the premises to their own use and for damages by depriving the plaintiffs of a further renewal of the lease of the demised premises, to the amount of $18,000. Upon the trial, at the close of the evidence, the court directed a verdict in favor of the defendants.

We are of opinion that the verdict was properly directed. The lease executed in 1810 should not be so construed as to create a perpetuity. Rutgers *v.* Hunter, 6 Johns. Ch. 215; Carr *v.* Ellison, 20 Wend. 178; Piggot *v.* Mason, 1 Paige, 412; Banker *v.* Banker, 9 Abb. N. C. 411. Its language is satisfied by holding that it gave the lessee the right to two renewals, and

those renewals were subsequently given; and it must be assumed that the parties so understood the first lease. The two renewals, signed by both parties, gave that lease a practical construction which should have great weight with any court called upon to ascertain its meaning and effect.

But the second lease, executed in 1840, which then defined the rights of the parties, contained a covenant for but one renewal. In the last lease there was no covenant for renewal, and in the lease the lessee absolutely covenanted at the end of his term to surrender up the premises to the lessor. So long as the lease remained in its present form, neither lessee, nor any person claiming under him, could assert any right to the premises after its termination. It defines the precise rights of the parties in the demised premises, and neither could assert anything in contravention of it.

This action was brought mainly for the purpose of reforming the last two leases. But there was no proof of any mistake, or fraud in their execution, or in the terms inserted in them; and therefore, even if the statute of limitations did not furnish a bar to the action to reform the leases, there was no basis or ground for their reformation. The plaintiffs' action therefore utterly failed, and a verdict was properly directed for the defendants.

The judgment entered upon the verdict provides that the defendants should recover costs of the plaintiffs, and have execution therefor. At the general term it was also adjudged that the city should recover of the plaintiffs, as executors, its costs, and should have execution therefor. The plaintiffs now complain of this provision for costs, and cite section 3246 of the Code. That section expressly authorizes costs against them as executors. The court did not direct them to pay the costs personally, but the judgment for costs is against them in their representative capacity. After a verdict had been directed for the defendants, the plaintiffs moved for a new trial upon the judge's minutes, which was denied, and, after entry of judgment, they appealed to the general term, both from the order denying their motion for a new trial and from the judgment, and at the general term both the order and judgment were affirmed, and the court awarded against the plaintiffs, not only costs upon the appeal from the judgment, but also $10 costs upon the appeal from the order. Having awarded costs upon the appeal from the judgment, the court had no power to award costs upon the appeal from the order. Code, § 3239, subd. 2. It is a small matter, and should have been corrected in the court below, and we have no means of knowing that it was not corrected in the judgment finally entered. The judgments in the court below should not have contained the provis-

sions that the defendants should have executions for their costs. The judgments for costs could be enforced by executions only in case they were allowed by the surrogate, as provided in sections 1825 and 1826 of the Code. But this is an innocuous informality. Any informality in the judgment should have been corrected by motion; and if the plaintiffs failed, upon such motion, in a matter affecting a substantial right not resting in discretion, they could have reached this court by an appeal from the order denying their motion. We do not correct such formalities upon a mere appeal from the judgment.

The judgment should therefore be affirmed, with costs against the plaintiffs as executors.

All concur.

Leases — Statute of Frauds — Contract for a Lease.

Freeland *v.* Ritz, 154 Mass. 257; 28 N. E. 226.

LATHROP, J. This is an action of contract brought by the members of the firm of Freeland, Loomis & Co. against the members of the firm of Ritz & Glines, for the breach of an agreement, under seal and signed by the parties, to accept a lease of certain rooms in a building. The agreement declared on recited that a building was then in process of erection by the Boylston Market Association, on the corner of Washington street and Boylston street, in Boston; that Freeland, Loomis & Co. had entered into an agreement with said association for a lease of said building as soon as the same should be completed; and that Ritz & Glines were desirous of obtaining from Freeland, Loomis & Co. a lease of part of said building, "to wit, rooms on the sixth floor thereof, as marked on plan of said floor, in the possession of Freeland, Loomis & Co., containing about twenty-five hundred square feet, more or less, and situated in the northeasterly corner of said building, for the purpose of there conducting the photographic business." Freeland, Loomis & Co. agreed as soon as the building should be ready for occupancy, and a lease thereof executed and delivered to them, to execute and deliver, and Ritz & Glines agreed to accept, "a lease of the rooms aforesaid, to be used solely and exclusively for the business aforesaid, for a period of five years from the date of the completion of said building, at an annual rental of twenty-five hundred dollars, payable in equal monthly installments, the lease to be in substantial accordance with the blank form hereunto annexed, and to be made subject in all respects to the terms and conditions of the said agreement and lease between said Freeland, Loomis & Co. and said Boylston Market Association."

1. The defendants contend that, inasmuch as the agreement provides that the lease is "to be made subject in all respects to the agreement and lease between" the plaintiffs and their lessor, which lease was not then in existence, there is no sufficient agreement or memorandum to satisfy the statute of frauds. Pub. St., c. 78, § 1, cl. 4. The agreement declared on is dated April 17, 1888, and it is clear that, considered alone, it is insufficient to satisfy the statute, for some of its terms were then uncertain, and might never be made certain. May *v.* Ward, 134 Mass. 127; Ashcroft *v.* Butterworth, 136 Mass. 511. What was then uncertain has, however, since been made certain, as it appears by the report, upon which the case comes before us, that in January, 1889, before this action was brought, a lease, in writing, of the entire building, was delivered to the plaintiffs by their lessor. It is a well-settled rule of law that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together, as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to. Atwood *v.* Cobb, 16 Pick. 227, 230; Lerned *v.* Wannemacher, 9 Allen, 412; Rhoades *v.* Castner, 12 Allen, 130; Beckwith *v.* Talbot, 95 U. S. 289; Grafton *v.* Cummings, 99 U. S. 100; Ryan *v.* U. S., 136 U. S. 68, 83; 10 Sup. Ct. Rep. 916; Peck *v.* Vandemark, 99 N. Y. 30; Varnish Co. *v.* Lorick (S. C.), 8 S. E. Rep. 8; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78, 102; Baumann *v.* James, L. R. 3 Ch. App. 508; Shardlow *v.* Cotterell, 18 Ch. Div. 280; 20 Ch. Div. 90; Studds *v.* Watson, 28 Ch. Div. 305; Oliver *v.* Hunting, 44 Ch. Div. 205; Long *v.* Millar, 4 C. P. Div. 450; Cave *v.* Hastings, 7 Q. B. Div. 125.

The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed; and, in support of this view, rely upon the case of Wood *v.* Midgley, 2 Smale & G. 115, no appeal, 5 De Gex, M. & G. 41. This was a bill for specific performance of a contract of sale of land. Some of the terms had been reduced to writing, but not signed. The purchaser paid his deposit money to the auctioneer who sold the land, and he signed the following receipt: "Memorandum. Mr. Thomas Midgley has paid to me the sum of £50 as a deposit, and in part payment of £1,000 for the purchase of the Ship and

and Camel public house at Dockhead, the terms to be expressed in an agreement to be signed as soon as prepared." Vice-Chancellor Stuart overruled a demurrer to the bill, on the ground that the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. On appeal, the demurrer was sustained by Lord Justice Turner and Lord Justice Knight-Bruce, on the ground that the agreement referred to, although it fixed the price, left other points to be determined. "The conditions of sale were to be adapted to a sale by private contract, and were to be subject to a future agreement." The case is therefore one of an agreement incomplete when made, and which never was completed. See, also, Ridgway *v.* Wharton, *ubi supra;* Fitzmaurice *v.* Bayley, *ubi supra;* Rummens *v.* Robins, 3 De Gex, J. & S. 88. In Brown *v.* Bellows, 4 Pick. 179, the plaintiff and the defendant were owners of a water privilege, with the building thereon, etc. The plaintiff agreed to sell his interest, and the defendant agreed to buy it, "at such prices as shall be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant and the third by the two thus chosen, which award shall be final and binding on the parties." After the price had been thus determined in writing, the defendant refused to perform his agreement. The plaintiff brought an action for covenant broken, to which the defendant set up the statute of frauds, contending that the referees were not named in the agreement, and that it depended wholly upon parol evidence to determine who they were. This objection was disposed of by the court, saying that the contract had been performed in this respect. The defendant further contended that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees. But this objection was overruled. The last point decided in this case, therefore, is a direct authority for the proposition that it is no objection to a written contract that some of the terms are to be fixed by something to be done in the future, if that something is done before action is brought; and that, if it is in writing, the provisions of the statute of frauds are complied with. We are therefore of opinion that the statute of frauds is no defense to this action.

2. The defendants further contend that the plaintiffs are not entitled to recover, because they have not performed their part of the agreement. It appears from the report that the plaintiffs on February 11, 1889, sent to the defendants a letter in regard to the rooms in the new building, and in regard to their lease, to which letter the defendants made no reply. There was evidence that duplicate leases were sent to the defendant Ritz about Feb-

ruary 15, 1880; that he afterwards sent one of them to the defendant Glines; that these leases were in the possession of the defendants at the time of the trial; that the plaintiffs had not seen or heard from Ritz after sending the leases; that two or three weeks after February 15th, Glines had called on the plaintiffs, and said that he was ready to sign, but Ritz would not, and that Ritz would not go in company with him; that neither defendant had signed the lease or offered to sign any form of lease. Glines, who was called as a witness by the plaintiffs, testified that Ritz declined to have anything to do with him in this matter; and that he (Glines) had said that he could not sign because Ritz would not, as he had not the money to carry it out if he did sign. It was agreed that, prior to the bringing of the writ, the defendants had said to the plaintiffs that they should not sign the lease, and the plaintiffs might go ahead and let the rooms. The defendants' counsel pointed out, at the argument, several particulars in which, as they contended, the lease sent to the defendants differed from the form annexed to the agreement. We do not find it necessary to consider these, as we are of opinion that, on the evidence, the jury might well have found that the defendant made no objection to the lease sent them, were not willing to accept a lease in any form, and therefore waived a strict compliance by the plaintiffs with the terms of the agreement. See Gerrish *v.* Norris, 9 Cush. 167, as modified by Holdsworth *v.* Tucker, 143 Mass. 369, 375; 9 N. E. Rep. 764; Brewer *v.* Winchester, 2 Allen, 389; Curtis *v.* Aspinwall, 114 Mass. 187, 193; Lowe *v.* Harwood, 139 Mass. 133.

3. At the trial the presiding judge ruled that the action in its present form could not be maintained, and ordered a verdict for the defendants, reserving the right to the plaintiffs to move to amend, upon such terms as the superior court might order, if, in the opinion of the supreme judicial court, the plaintiffs, upon the evidence, would have a right to recover in any form of action at law; in which event the verdict was to be set aside and the case to stand for trial. At the argument in this court, no objection was made either to the form of the action or to the declaration. We have not, therefore, carefully scrutinized either. It is obvious, however, that, as the contract declared on is incomplete in itself, the terms of the lease to the plaintiffs from their lessor, as far as they are material to complete the contract, should be set forth with appropriate allegations; and that, if the plaintiff rely upon a waiver by the defendants, it should be pleaded as an excuse for non-performance. Palmer *v.* Sawyer, 114 Mass. 1, 15. Whether the substitute declaration, so-called, sets forth a waiver, need not be considered, as the point has not

been argued. The result is, therefore, that the verdict is to be set aside, and the case stand for trial. So ordered.

Assignment and Subletting.

Sexton *v.* Chicago Storage Co., 129 Ill. 318; 21 N. E. 920.

Appeal from appellate court, first district.

Bill brought, in the superior court of Cook County, by Patrick J. Sexton, in his own behalf, as well as in behalf of such other of the creditors of the Chicago Storage Company as should come in and make themselves parties and contribute towards the costs of suit, against the Chicago Storage Company, a corporation, and Charles N. Chipman, Alfred Willford, James B. Craney, John C. Magee, Charles G. Barth, W. R. Parks, David Cole, and Kenneth R. Smoot, its stockholders, to dissolve the corporation, on the ground that it had ceased doing business, leaving debts unpaid; and to enforce the payment of its debts against the stockholders. Complainant's claim against the corporation arose as follows: May 1, 1885, he leased to Frank F. Cole, by two separate leases for different parts of the building, a certain building in the city of Chicago, for the term of three years, at a monthly rental of $466.66. May 9, 1885, Cole leased the same premises to the Chicago Storage Company, for the whole expired term, at a rental of $300 per month for the first year, $500 per month for the second year, and $650 per month for the third year. This lease reserved a right of forfeiture and re-entry for non-payment of rent or other breach of its conditions, and contained a covenant to surrender the premises to Cole at the expiration of the term, or sooner determination of the lease. Complainant's suit was based upon the theory that this instrument was, in effect, an assignment of the leases from himself to Cole, making the corporation liable to him for the rent reserved in these leases. The superior court held that the instrument was a sublease, and that the corporation was therefore not indebted to complainant, and accordingly dismissed the bill for want of equity. The appellate court affirmed the decree. Complainant appeals.

Scholfield, J. The evidence sufficiently proves that "the Chicago Storage Company has ceased doing business." This is not contested by counsel for appellees, though they seek to avoid its effect by the circumstance which they claim to be proved, that such failure is solely because of the seizure and appropriation of the property for the payment of rent due from Frank F. Cole alone to appellant. It is therefore manifest that in deter-

mining whether the corporation has left debts unpaid, so as to bring the case within section 25, c. 32, Rev. St. 1874, as amended by the act of May 22, 1877, in relation to corporations (Laws 1877, p. 66), the first and most important question is whether the storage company is an assignee of the term of Frank F. Cole, or only a sublessee under him, for, if it is an assignee of the term of Frank F. Cole, it stands in his shoes as respects covenant to pay rent, and its property is liable to be seized and appropriated to the payment of the rent by distress, as was done. If, however, it is but a sublessee under Frank F. Cole, it is liable only on its covenants to him.

The leases to Frank F. Cole are "for and during" the terms named, "and until the 1st day of May, 1888." The lease executed by Frank F. Cole to the Chicago Storage Company is of precisely the same premises included by the leases to him, and it is in the identical language of those leases, "for and during" the term named "and until the 1st day of May, 1888;" so that the terms all end at the same instant of time. No space of time, however minute, therefore, can by any possibility remain after the term of the storage company has ended before the expiration of the term of Cole, in which he could enter upon or accept a surrender of the premises. The general principle as held by all the authorities is that, where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privy of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee on the covenants running with the land, one of which is that to pay rent; but if the lessee sublets the premises, reserving or retaining any reversion, however small, the privity of estate between the sublessee and the original landlord is not established, and the latter has no right of action against the former, there being neither privity of contract nor privity of estate between them. The chief difficulty has been in determining what constitutes such reservation of a reversion. The more recent English decisions, and all of the text-books treating of the question which have been accessible to us hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment notwithstanding that words of devise instead of assignment are used, and notwithstanding the reservation of a rent to the grantor, and a right of re-entry on the non-payment of rent or the non-performance of the other covenants contained in it. 1 Platt Leases, 1–9, 102; Woodf. Landl. & Ten. (7th Ed.) 211; Wood Landl. & Ten., p. 131, § 93; Tayl. Landl. & Ten. (8th Ed.)16, note 3; Bac. Abr. tit. "Leases,"

H. 3; 2 Prest. Conv. 124, 125; Beardman *v.* Wilson, L. R. 4. C. P. 57; Doe *v.* Bateman, 2 Barn. & Ald. 158; Wollaston *v.* Hakewill, 3 Scott N. R. 616. Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself; and it has been held that the relation, as between the parties, was that of landlord and tenant, or, perhaps more correctly, lessee and sublessee, because such was clearly the intention of the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relation of landlord and assignee of a term, however, it has been seen, does not result from contract, but from privity of estate, and therefore, when the original lessee has divested himself of his entire term and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term. See Wood Landl. & Ten. 122, and authorities cited in note 1; Van Rensselaer *v.* Hays, 19 N. Y. 68; Pluck *v.* Digges, 5 Bligh (N. S.), 31; Thorn *v.* Wollcombe, 3 Barn. & Adol. 586; Carpenters' Union *v.* Railway Co., 45 Ind. 281; Smiley *v.* Van Winkle, 6 Cal. 605; Blumenberg *v.* Myres, 32 Cal. 93; Schilling *v.* Holmes, 23 Cal. 230.

Counsel for appellees contend, and the courts below ruled accordingly, that the reservation of a new and different rent, or the reservation to the lessor of the right to declare the lease void for the non-performance of its covenants, and to re-enter for such breach, or at the end of the term coupled with the covenant of the lessee to surrender at the end of the term or upon forfeiture of the term for breach of covenant, make the letting by the lessee a subletting and not an assignment of the term, notwithstanding the lessee has retained in himself no part of the term; and they rely upon Collins *v.* Hasbrouck, 56 N. Y. 157; Ganson *v.* Tifft, 71 N. Y. 48; McNeil *v.* Kendall, 128 Mass. 243; and Dunlap *v.* Bullard, 131 Mass. 161, as sustaining this contention. There is general language in Collins *v.* Hasbrouck quite as broad as claimed; but no question therein presented called for its use, and its meaning ought to be limited by the facts to which it was applied. There the first original lease was for the term of 10 years from the 1st of April, 1864; the second was for the term of 9 years from the 1st of April, 1865. Thus both expired April 1, 1874. The sublease was for the term of two years and seven months from the 1st of September, 1867,—that is to say, until the 1st of April, 1870,— with the privilege, however, to the lessee to extend the term four years, or until April 1, 1874, by giving two

months' notice, etc. The plaintiff claimed that the leases were forfeited by subletting, and the court so held. No distinction was taken, in the opinion of the court, between an absolute demise until the end of the term and a mere privilege to have the demise extended four years, which was until the end of the term. We have held that a similar clause in a lease is not a present demise, but a mere covenant, which may be specifically enforced in chancery, or upon which an action at law may be maintained for a breach of covenant. Hunter *v.* Silvers, 15 Ill. 174; Sutherland *v.* Goodnow, 108 Ill. 528. And it would seem quite evident that in no view could the reversion have passed until after the grantee elected to have the term for four years longer; and so when the lease was executed, there was still a reversionary interest in the sublessor, of four years, subjected, though it may have been, to be thereafter divested by the election of the sublessee. In Ganson *v.* Tifft, the sublease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessors, and the court said: "This constitutes a sublease of the premises, and not an assignment of the term." In Stewart *v.* Railroad Co., 102 N. Y. 601; 8 N. E. Rep. 200, there was a demise by the lessee to the Long Island Railroad Company for a term longer than that held by the lessee. There was also a different rent to be paid than that provided to be paid by the original lease, and there was a reservation of the right to re-enter for non-payment of rent, etc. It was held that, as to the original landlord, this amounted to an assignment of the lease, and that its character was not destroyed by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment of rent, or by its assumption of the character of a sublease. The court, after laying down the rule substantially as we have heretofore stated it to be recognized by the text-books and recent English decisions, said: "The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor; but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended;" citing Tayl. Landl. & Ten. (7th Ed.), § 109, note; *Id.*, § 16, note 5; 1 Washb. Real Prop. (4th Ed.) 515, note 6; Adams *v.* Beach, 1 Phila. 99, 178; Carpenters' Union *v.* Railway Co., 45 Ind. 281; Lee *v.* Payne, 4 Mich. 106; Lloyd *v.* Cozens, 2 Ashm. 138; Wood Landl. & Ten. (Banks' Ed.) 547, — and then adding: "These rules are fully recognized in this State. Prescott *v.* De Forest, 16 Johns. 159; Bedford *v.*

Terhune, 30 N. Y. 457; Davis *v.* Morris, 36 N. Y. 569; Woodhull *v.* Rosenthal, 61 N. Y. 382, 391, 392." In speaking of the ruling in Collins *v.* Hasbrouck, *supra*, after stating the facts, the court said: "In the opinion, the question is discussed whether the sublease amounted to an assignment of the term of the original lease, or a mere subletting or reletting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling; but, in discussing it, the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sublease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument which are above referred to would be proper subjects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz., whether the second lease was a subletting or reletting of part of the demised premises, which constituted a breach of the covenant not to sublet or relet. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to enter for breach of condition are immaterial." And, after quoting many authorities to sustain that position, the opinion proceeds: "The cases which hold that where a lessee subleases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sublease does not operate as an assignment, proceed upon the theory that, by reason of this covenant to surrender, some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sublessee would surrender the demised premises on the last day of the term."

It is true that in this case, as has been before stated, the lessee demised for a number of years beyond the term for which he held; but it is impossible that, upon principle, there can be any difference between a demise of an entire term, which can leave no possible space of time remaining in the lessor, and a demise for any additional time beyond the term; for, since no one can demise what he does not have, all that can pass by the demise in the latter instance is the entire term of the lessor. If, here, the demise of Frank F. Cole vests his entire interest in the

property, as it professes to do, "for and during" the remainder of his term, "and until the 1st day of May, 1888," it cannot be that any other portion, however short in duration, of the term granted him by the leases of appellant, remained in him, because they are limited by the same words precisely, namely, "for and during" the term, "and until the 1st day of May, 1888." In McNeil *v.* Kendall, *supra*, there were easements reserved from the effect of the lease. In Dunlap *v.* Bullard, *supra*, however, the facts are analogous in principle to those here involved; and it was held that the demise of the entire term of the lessee was a sublease and not an assignment, because of the right reserved in the lease for the lessor to re-enter and resume possession for a breach of the covenants. But this is held upon the ground that, under the decisions of that court, the right to re-enter and forfeit the lease is a contingent reversionary estate in the property; the court having previously held, in Austin *v.* Parish, 21 Pick. 215–223, and Church *v.* Grant, 3 Gray, 142–147, that, where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a local statute (see Tied. Real Prop. note 1 to section 277, and note 1, page 904, 6 Amer. & Eng. Cyclop. Law), but whether this be true or not, the decisions are plainly contrary to the principles of the common law. The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an estate; and Coke says: "The reason hereof is for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over." Co. Lit., § 347 (214*a*). See also, 1 Com. Dig. tit. "Assignment," C 2, p. 688; 3 Com. Dig. tit. "Condition," O 1, p. 124; 4 Kent. Comm. (8th Ed.) 126, 123; 1 Brest. Est. 20, 21; Shep. Touch. 117, 121. It is said in 1 Washb. Real Prop. (2d Ed.) 474, 451: "Such a right [*i. e.*, to enter for breach of condition subsequent] is not a reversion, nor is it an estate in land. It is a mere chose in action, and when enforced, the grantor is in by the forfeiture of the condition, and not by the reverter." To like effect is, also, Tied. Real. Prop., § 277; 6 Amer. & Eng. Cyclop. Law, 903; Tayl. Landl. & Ten. (8th Ed.), § 293; Southard *v.* Railroad Co., 26 N. J. Law, 11; Webster *v.* Cooper, 14 How. 501; Schulenberg *v.* Harriman, 21 Wall. 63; Nicoll *v.* Railroad Co., 12 N. Y. 121. It is true that, by section 14 of our statute in relation to landlord and tenant (Rev. St. 1874, p. 659), "the grantees of any demised lands, tenements, rents,

or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies, by entry, action, or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor." But this does not make what was before but a chose in action an estate. The right to enter for breach of covenant is still but a remedy for enforcing performance of a contract, which may be defeated by tender. Tayl. Land. & Ten. (8th Ed.) 302. As is said by the court in De Peyster *v.* Michael, 6 N. Y. 507, in speaking of the effect of a like statute of New York: "The statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other estate." See, also, Nicoll *v.* Railroad Co., 12 N. Y., at p. 139. It follows that, in our opinion, the rule assumed to be followed in Collins *v.* Hasbrouck, Ganson *v.* Tifft, and Dunlap *v.* Bullard, *supra*, is not in conformity with the common law, and that it cannot, therefore, be applied here.

The objection that the written assent of appellant was not obtained to the assignment cannot be urged by appellees. The clause in the leases, in that respect, is for the benefit of, and can be set up by appellant alone. He may waive it if he will; and, if he does not choose to set it up, no one else can. Webster *v.* Nichols, 104 Ill. 160; Willoughby *v.* Lawrence, 116 Ill. 11; 4 N. E. Rep. 356; Arnsby *v.* Woodward, 6 Barn. & C. 519; Rede *v.* Farr, 6 Maule & S. 121.

But counsel insist that appellant is estopped, by his conduct, to now allege that the instrument executed by Frank F. Cole is an assignment. We have carefully considered the evidence bearing upon this question, and we are unable to concur in this view. Appellant did refuse to acquiesce in the construction placed by appellees upon the lease of Frank F. Cole, and to settle with them upon that basis. He refused to release Frank F. Cole, and accept the storage company alone; and he refused to accept the amount of rent which the storage company obligated itself to pay Frank F. Cole as a satisfaction of Frank F. Cole's covenant to pay rent to him; but he was all the time willing that the storage company should remain in possession, provided the rent due him by his lease to Frank F. Cole was paid to him. He knew the terms of the lease of Frank F. Cole to the storage company, and he afterwards received rent from it, and permitted it to remain in possession. The lessee continues, notwithstand-

ing the assignment, liable upon his express covenant to pay rent; and the assignee becomes liable upon the same covenant, by reason of his privity of estate, because that covenant runs with the land. Tayl. Landl. & Ten. (8th ed.), § 438; 2 Platt Leases, 356; Walton *v.* Cronly, 14 Wend. 63; Bailey *v.* Wells, 8 Wis. 141. Since appellant might sue Cole, on his express covenant to pay rent, and he, having fled the State, take out an attachment in aid thereof, we perceive no reason why he might not at the same time take garnishee process against the storage company, and recover any debt which it owed him. There is certainly nothing in this inconsistent with his ultimately enforcing his liability against that company as assignee of Cole's term. It is not shown that the storage company has been, by anything done or said by appellant, induced to do to its prejudice anything that it would not otherwise have done. No judgment has been recovered against it, as garnishee of Frank F. Cole, for rent due from it to Frank F. Cole, nor does it appear, otherwise, to have been compelled to pay money or incur liability by reason of any act or word of appellant proceeding upon the recognition of its being liable to Frank F. Cole, as such lessee, only. For the reasons given, the decree of the superior court, and the judgment of the appellate court, are reversed, and the cause is remanded to the superior court for further proceedings consistent with this opinion.

No Implied Warranty of Landlord that Premises are not Dangerous or Unfit for Occupation.

Doyle *v.* Union Pac. Ry., 147 U. S. 413.

Mr. Justice SHIRAS delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow with a family of six children, agreed with the Union Pacific Railroad Company to occupy the company's section house situated on the line of the railroad at or near Woodstock, in the county of Chaffee and State of Colorado, and to board at said section house such section hands and other employees of the company as it should desire at the rate of $4.50 per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employees so to be boarded.

Mrs. Doyle moved with her children into the section house, and continued in the discharge of her duties as boarding housekeeper until the 10th day of March, A. D. 1884, when a snowslide overwhelmed the section house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the circuit court of the United States for the district of Colorado, two actions against the Union Pacific Railway Company — one for her personal injuries; the other for damages suffered by her in the loss of her children — and which latter action was based on a statute of the State of Colorado.

The actions resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writ of error. As the cases turn upon the same facts and principles of law, they can be disposed of together.

The record discloses that the facts of the case, as claimed by the respective parties, and certain admissions by the defendant company, were stated in a bill of exceptions, and upon which instructions by the court were given which are made the subject of the assignment of error.

The bill of exceptions was as follows: —

"Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said circuit court, the defendant admitted, and such admissions were received in evidence before the jury:

"That the plaintiff was at the several times named in the complaint a widow and the mother of Martin Doyle, Andrew Doyle, Christopher Doyle, Catherine Doyle, Marcella Doyle and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff, and as having each and all been killed by a snowslide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death. That each of said children was of the age and sex stated in the complaint; was each unmarried and had no child or children, and had each lived with their said mother, making their home with her, up to the time of their death; and were each then living with the plaintiff, aiding and assisting her in and about making a living, and in and about her duties and labors in the keeping of the section house of the defendant at Woodstock, in the county of Chaffee and State of Colorado, where said children were killed. That said children were killed while in said section house, on the 10th day of March, A. D. 1884, by a snowslide, which then and there occurred from the mountain side above said section house. That said section house was built and used by the defendant as and for a section house and a place at which the section hands of defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant, and for the mutual benefit of herself and the defendant, the plaintiff undertook and

agreed with the defendant to keep for it, during its will and pleasure, its section house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and State of Colorado. That by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week to be paid by the persons so furnished with such board; but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board. The plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section house with her family, and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snowslide, on the 10th of March, A. D. 1884. That the defendant did not at any time notify or appraise the plaintiff or either of her said children, or cause her or either of them to be notified or appraised, of the danger of a snowslide or snowslides or of the liability of a snowslide or snowslides at such place where said section house then was, or in that locality. And the plaintiff, further to maintain the issues on her part, introduced evidence tending to show that said section house was a one-story frame building, and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account. That the sides of the mountain at the base of which was the house in question were marked by the tracks of former snowslides, but only those familiar with snowslides and their effects would know what they meant. That the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section house. That the plaintiff and her said children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the danger incident thereto, and was not aware of the particular danger in question. That there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section house, which cut off a view of the mountain side above said hip from the section house or its immediate vicinity. That above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to

create snowslides of danger to persons in said section house or its vicinity. That this danger was not apparent even to a person having knowledge of snowslides and their causes without a view or examination of this mountain side above said hip. That the altitude of said section house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet. That the snowfall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting. That the snowslide of March 10, 1884, which killed the said children, proceeded from this depression above said hip. That a snowslide of less dimensions, and of less scope and extent, occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section house, and of which the defendant had knowledge at the time thereof.

"That the attention of the superintendent of the construction of said railroad and of said section house was called to the fact of such danger, at or about the time said section house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

"That her said son Andrew Doyle was an employee of the defendant — a section hand on the same section where said section house was located — at the time he was so killed by said snowslide. That the plaintiff and her said children were in said section house at the time the said children were killed, and that neither of said children were aware of said danger before the said snowslide of March 10, 1884, occurred.

"That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section house, but became wider after leaving the hip. That with this draw another draw united about midway between the section house and the said hip, and formed one draw from their point of union to the section house.

"That this mountain is a part of the range of mountains known as the 'Continental Divide,' which divides the waters of the Atlantic from those of the Pacific. At this point above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called 'Alpine Tunnel,' which is to the westward of a line north of Woodstock, and descends this mountain at a heavy grade, along the side thereof, about midway between the section house and the said hip on the mountain (which hip is termed a 'projection of rocks' by some of the witnesses), and passes on to the eastward of Woodstock a considerable distance, where it turns,

and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section house and said hip, — the section house being below and distant from this lower track about two hundred and thirty feet; and the two tracks forming this horseshoe are both between the section house and said hip, and on a direct line from the section house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section house to the hip on the mountain side above. That there was a water tank on the upper side of the lower track fifty or sixty feet to the westward of the section house, which water tank was injured by the snowslide of February, 1883.

"That the snowslide of March 10, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section house was not far from the center of said snowslide track.

"That the contour of this mountain, beginning at the section house and ascending the mountain, is about as follows, to wit: Above the section house it slopes slowly to the first railroad track; then there is a rockslide; then there is a bench above that, and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks (the hip on the mountain side), and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber, and in about the section house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees.

"That the timber on the mountain side was sparse and scattered. That only a few trees were carried down by the snowslide. That snowslides do not always follow beaten tracks made by former snowslides on the same mountain side but frequently depart therefrom. That the snowslide of March 10, 1884, separated into broken fragments or divisions before reaching the

base of the mountain, one of which struck the section house, resulting in the injuries complained of.

"That the winter of 1883–84 was severer, and the snow fell some deeper, than the winter previous thereto, and that it snowed heavily and continuously from about the 1st of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow. That ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift, and after it had settled compactly. That it drifted greatly, filling up basins and depressions on the mountain sides. That there were rockslides and existing evidences of former snowslides on this mountain side above said section house.

"That the snowslide of February, 1883, deposited snow and debris on the upper track of the railroad above said section house from twenty to twenty-five feet deep; and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

"And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section house was built below the said tracks and behind, and protected by a thick growth of timber above and between said section house and the mountain; that there were no marks or tracks of former snowslides directly above or in the vicinity of said section house; that the defendant was not aware of any danger from snowslides at the place where the section house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built, and the contour of the mountains above the same to the summit of the range, and that said section house was built at that place because the officers of the company thought it was — safe place, and could not be endangered by snowslides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snowslides which might occur on the mountain sides above said section house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built, and above, on the mountain side, showed that there had not been a snowslide there for at least two hundred years; that the snowslide of March 10, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snowslide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snowslide in 1883

did no damage except to cover up a short distance of the railroad track, and break in some boards of the house under the water tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snowslides at the place where said section house was built, but that the conversation or notice referred to was in regard to a place a mile or more further up Quartz creek; that the said Andrew Doyle had been an employee of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow, and all attempts to open it having been abandoned, and for ten days or more before the snowslide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section house and its immediate locality from snowslides; that there was no chasm or draw immediately above said section house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section house; that said section house was broken down by said snowslide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section house was on the southerly side of said snowslide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or 'prominence;' that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section house and the first railroad track, and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rockslides or existing evidences of former snowslides on the mountain sides immediately above said section house.

"And the foregoing was all the evidence in the case."

To the answers of the court to the prayers for instructions and to the charge, the plaintiff has filed 13 assignments of error.

The twelfth assignment alleges that "the circuit court erred in charging the jury substantially to the effect that they must find for the defendant," and in the brief of the plaintiff in error it is asserted that the answers of the court to the several requests for instructions were in effect directions to the jury to find for the defendant.

Although, in point of fact, the court did not give the jury

peremptory instructions to find for the defendant, but left the cases to them on instructions under which they might have found verdicts for the plaintiff, yet the validity of the plaintiff's exceptions to the court's treatment of the cases may be conveniently tested by assuming, for the present, that the charge and instructions legally amounted to a direction to find for the defendant. If an examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in so doing, it will not be necessary to consider each and every assignment of error, nor to minutely scan isolated expressions used by the court.

The first question to be determined is, what was the relation between the plaintiff and the railway company? Was Mrs. Doyle a servant or employee of the company, aiding in the transaction of its business and subject to its directions, or was she a tenant at will holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company, or change her relation to the company as a tenant at will of the company's house. Such an arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snowslide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation, or deceit on the part of the defendant company as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section house was built near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or

of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snowslides or of the liability of snowslides at such place where said section then was, or in that locality; and upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of carelessness or disregard of duty towards the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. The law is thus stated in a well-known work on Landlord and Tenant: —

"There is no implied warranty, on the letting of a house, that it is safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let; and where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent; and in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee." Tayl. Landl. & Ten., § 382.

The principles applied to the present case have been well stated in the recent case of Bowe *v.* Hunking, 135 Mass. 380. The syllabus states the case and decision as follows: —

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread

of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the Supreme Court sustained this ruling. Field, J., giving the opinion of the court, said (page 383): —

"There is no implied warranty in letting of an unfurnished house or tenement that it is reasonably fit for use [citing cases]. The tenant takes an estate in the premises hired and persons who occupy by his permission or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises [citing cases].

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase. This duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this is there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and Keates *v.* Earl of Cadogan, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See, also, Robbins *v.* Jones, 15 C. B. (N. S.) 240. This is a general rule of caveat emptor. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. Hight *v.*

Bacon, 126 Mass. 10; Ward *v.* Hobbs, 3 Q. B. Div. 150; Howard *v.* Emerson, 110 Mass. 320. This rule does not apply to cases of fraud."

This rule of caveat emptor has been applied also in many other cases, some of which we now refer to.

Keates *v.* Earl of Cadogan, above cited, was an action on the case. The declaration states in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and was likely to fall and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice, or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration, and the court unanimously sustained the demurrer. Jervis, C. J., giving the opinion, said (page 609): —

"It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said that, because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration that, the defendant knowing the state of things, the plaintiff may have come to him and said, 'Will you lease that house to me?' and the defendant may have answered, 'Yes, I will.' It is not contended by the plaintiff that any misrepresentation was made, nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, there being no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting."

The rule of caveat emptor was also applied in the recent case of Woods *v.* Cotton Co., 134 Mass. 357. Defendant was owner of a tenement house fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material, and constructed

in such manner, that they occasioned the accumulation of snow and ice thereon improperly, and that the defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable; but the trial court held there was no evidence to go to the jury, and directed a verdict for defendant, and the Supreme Court sustained this ruling. Field, J., giving the opinion, says (page 359): —

"There may be cases in which the landlord is liable to the tenant for injuries received from secret defects which are known to the landlord and concealed from the tenant, but this case discloses no such defects in the steps. * * * [Page 361.] The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises and that it was contended 'that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of ice and snow thereon improperly.' The steps were of rough-split, unhewn granite, and the structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury.' The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant."

Hazlett *v.* Powell, 30 Pa. St. 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of an hotel, on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel was shut off or obstructed, and, as a result, that the hotel was rendered pro tanto unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts (page 294), which the court states as follows (page 297): —

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot — at what time is not offered to be shown — and did not communicate this information to the lessees. We think he was not bound to do so, and that, if the evidence had been received, it would have furnished no evidence of fraud on the part of the lessor, or become the foundation in equity for relief of the lessees. The substance of the complaint regarded something that the lessor was no more presumed to know than the lessees. It was nothing which concerned the title of the lessor, or the title he was about to pass to the lessees. It was a collateral fact, — something only within the

knowledge and determination of a stranger to both parties; and, if material to either, I can see no obligation resting on either side to furnish to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence, and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings, and inquire for themselves. These were elements to be shown to constitute fraud, and make the testimony available.

" 'The general rule, both in law and equity,' says Story on Contracts (section 516), 'in respect to concealment, is that mere silence in regard to a material fact where there is no legal obligation to disclose will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation generally, which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed, such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or, where, being present, the buyer put the seller on good faith by agreeing to deal only on his misrepresentation. In all these kindred cases there must be no false representations nor proposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says Atkinson on Marketable Titles, 134, 'in the absence of special circumstances, are to be considered as acting at arm's-length. When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract.' *Id.* Illustrative of this is the celebrated case of Laidlaw *v.* Organ, 2 Wheat. 178. The parties had been negotiating for the purchase of a quantity of tobacco. The buyer got private information of the conclusion of peace with Great Britain, and called very early in the morning following the receipt of it on the holders of the tobacco, and ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice Marshall delivered the opinion of the court, to the effect that the buyer was not bound

to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession. And Chief Justice Gibson, in Kintzing *v.* McElrath, 5 Pa. St. 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See, also, Hershey *v.* Keembortz, 6 Pa. St. 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented [citing authorities], nor that they shall continue so, if there be no default on the part of the landlord."

In the recent case of Viterbo *v.* Friedlander, 120 U. S. 712; 7 Sup. Ct. Rep. 962, Mr. Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fixed for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides which was known only to the railway company, and which could not have been ascertained by the plaintiff. It was, indeed, alleged that "the section house was in a place of danger from snowslides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would not have justified verdict on the ground of negligence or

fraudulent expression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for defendant.

However, the record discloses that the court permitted the cases to go to the jury. It is true that the remarks made by the judge must have indicated to the jury that his own view was against the plaintiff's right to recover; but it has often been held by this court that it is not a reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jury are given to understand that they are not bound by such opinion. Baltimore & P. R. Co. *v.* Baptist Church, 137 U. S. 568; 11 Sup. Ct. Rep. 185; Simmons *v.* U. S., 142 U. S. 148; 12 Sup. Ct. Rep. 171.

It is not necessary for us to review in detail the criticisms made in the several instructions, for, as we have seen, even if such instructions had amounted, in a legal effect, to a direction to find for the defendant, no error would have been committed.

It is obvious that these views of the case of Marcella Doyle, claiming for her personal injuries, are equally applicable to her suit under the statute, for the loss of her children. The latter must be regarded as having entered under their mother's title, and not by reason of an invitation, express or implied, from the railway company; and hence they assumed a like risk, and are entitled to no other legal measure of redress.

No error being disclosed by these records, the judgment of the court below is in each case affirmed.

Lessor of Furnished House Impliedly Warrants its Fitness for Occupation.

Ingalls *v.* Hobbs, 156 Mass. 348; 31 N. E. 286.

KNOWLTON, J. This is an action to recover $500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason

gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of $500, with interest from the date of the writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to his court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of facts might be drawn. The only "matter of law apparent on the record" which can be considered as an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. St., c. 152, § 10; Rand *v.* Hanson, 154 Mass. — 28 N. E. Rep. 6; Mayhew *v.* Durfee, 138 Mass. 584; Railroad Co. *v.* Wilder, 137 Mass. 536; Hecht *v.* Batcheller, 147 Mass. 335; 17 N. E. Rep. 651; Fitzsimmons *v.* Carroll, 128 Mass. 401; Charlton *v.* Donnell, 100 Mass. 229. The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. Dutton *v.* Gerrish, 9 Cush. 89; Foster *v.* Peyser, *Id.* 242; Stevens *v.* Pierce, 151 Mass. 207; 23 N. E. Rep. 1006; Sutton *v.* Temple, 12 Mees. & W. 52; Hart *v.* Windsor, *Id.* 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than where there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and

appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. Smith *v.* Marrable, 11 Mees. & W. 5; Wilson *v.* Hatton, 2 Exch. Div. 336; Warehouse Co. *v.* Carr, 5 C. P. Div. 507; Sutton *v.* Semple, *ubi supra;* Hart *v.* Windsor, *ubi supra;* Bird *v.* Lord Greville, 1 Cababe & E. 317; Charsley *v.* Jones, 53 S. P. Q. B. Div. 280. In Dutton *v.* Gerrish, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in Edwards *v.* McLean, 122 N. Y. 302; 25 N. E. Rep. 483; Smith *v.* Marrable, and Wilson *v.* Hutton, cited above, are referred to with approval, although held inapplicable to the question then before the court. See Cleves *v.* Willoughby, 7 Hill, 83; Franklin *v.* Brown, 118 N. Y. 110, 23 N. E. Rep. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

Constructive Eviction.

Snow *v.* Pulitzer, 142 N. Y. 263; 36 N. E. 1059.

Earl, J. In 1848 Mr. French erected a seven-story building in the city of New York; subsequently, another person erected an adjoining four-story building; and, still later, another owner

erected another adjoining building, thus making three buildings in the block. There were no party walls, the buildings all having independent walls. Subsequently, French became the owner of all the buildings, and converted them into a hotel, called "French's Hotel;" the buildings being used together as one building, with doors and openings through them. The hotel property passed by will from French to his daughter Helen A. French; and in January, 1886, she leased the first floor of the four-story building to the plaintiff for a term ending on the 1st day of May, 1889. While the plaintiff was in the occupancy of his store, on the 10th day of April, 1888, she conveyed the entire block, designating it as "French's Hotel," and describing it as an entirety, subject to the lease, to the defendant. In June thereafter he commenced to tear down the seven-story building, and after the four upper stories thereof had been removed, down to the third story of the four-story building, it was found that the wall of the four-story building was supported by the adjoining wall of the seven-story building, and that it could not stand without such support, and it began to crack and break, and that there was imminent danger of its falling. Upon making this discovery, the persons engaged in taking down the seven-story building under the defendant discontinued their work; and thereafter proceedings were taken by the fire department of the city of New York, by which the four-story building was condemned, as unsafe, and there was a judgment directing the superintendent of buildings to remove the same, and in obedience to that judgment the defendant tore down the four-story building, and the plaintiff was thus deprived of the benefit of his lease, was ousted from the possession of the store, and his business broken up; and he brought this action to recover his damages. The contention of the defendant is that the plaintiff was not entitled to have the wall of the building in which his store was situated supported by the adjoining wall of the seven-story building; that there was no easement in that wall for the support of the wall of the four-story building; and hence, that no legal wrong was done to the plaintiff by the tearing down of that wall.

The trial judge held that if, at the time of the lease to the plaintiff, the wall of the building in which his store was located was dependent for support upon the adjoining wall, he was entitled to such support, and the defendant could not lawfully remove that wall, and thus render the four-story building untenantable. In this ruling we think the trial judge was clearly right. We are not dealing with a case where, at the time of the demise, the two buildings were separately owned, but with

a case where they were owned by the same person, and where all the buildings were held and owned as one entire property. When the plaintiff leased his store, he became entitled, as against the lessor, to the store as it then was, and, as against him, to have the walls sufficiently supported as they then were; and if the wall of the four-story building could not stand, of itself, then he was entitled to the support of the wall of the seven-story building, and the two walls constituted the wall of his building; and the defendant had no right to remove any portion of the wall of the four-story building, or any of its supports, so as to drive the plaintiff from his store. A landlord, in such a case, would have no more right to tear down the supporting wall than he would to tear down the demised building itself. The contention of the landlord, here, is against both reason and justice, and has no support in any precedent or any principle of law. The rights of the plaintiff do not depend upon the technical doctrine of eviction. The defendant was a trespasser and a wrong-doer, and is just as responsible for the consequences of his acts as he would have been if he had removed the roof from the building, or entered the plaintiff's store and physically expelled him. The responsibility of the defendant in no way depends upon his knowledge that the wall of the seven-story building was necessary to the support of the wall of the four-story building. He was bound to know what he was about, and cannot shield himself against a trespass because he did not foresee the consequences of his acts, or even because he did not not know that he was trespassing. If he supposed that he was entitled to take down the wall of the seven-story building, to the support of which plaintiff was entitled for his store, he was mistaken, and is responsible for the consequences of his mistake. When he learned that the wall of the four-story building could not stand without the support of the wall of the seven story building, he was bound to take the consequences of his acts, or to rebuild that wall, and thus support the wall of the four-story building. The defendant is not protected from responsibility, in this case, because, after he had removed the wall of the seven-story building down to the third story of the four-story building, thus rendering the latter dangerous and insecure, the fire department caused it to be removed. It was his act that brought on the proceeding by the fire department. He created the danger which invoked its action. It was due to his act, solely, that the building was finally taken down, and the plaintiff ousted, and deprived of his lease. While no authority is needed for a conclusion depending on such obvious principles of right and

justice, the case of Richards *v.* Ross, 9 Exch. 218, may be cited as having some bearing. There it was held that where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighboring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right; and, consequently if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles.

The learned counsel for the defendant complains that an improper rule or measure of damages was adopted by the trial judge. It was provided in the lease of the store to the plaintiff that the store should be used exclusively for the sale of confectionery; and at the time the plaintiff was evicted, and his business broken up, he was doing a large and profitable business in his line, and had on hand a large quantity of confectionery, which he was required to remove. The trial judge held that, if the plaintiff was entitled to recover at all, he was entitled to recover the damages which were the natural consequences of the destruction of the building occupied by him, and his eviction therefrom. He had made some expenditures in fitting up the store for his business, and the judge charged the jury that they could take those expenditures into consideration. There was also damage to, and depreciation of the stock of confectionery he had on hand; and the judge charged the jury that they could take that into consideration. He also charged the jury that, in estimating the plaintiff's damages, they could consider the profits he could have made in his business if he had been permitted to carry it on to the end of his lease. The charge of the judge as to these various items of damages seems to have been carefully limited and explained, and the only exception to which our attention is called, bearing on the damages, is the final exception in the case to the charge "in respect to the measure of damages." The judge was not requested to limit or explain his charge as to the measure of damages, or in any way to modify the rules laid down by him, and his attention was not called to any particular part of his charge on the question of damages, of which complaint was made, and hence the general exception is not available here. But the principal item of recovery was on account of the prospective profits in the plaintiff's business during the remainder of the term of his lease; and that they were proper to be con-

sidered in estimating his damages in a case like this, where he was evicted, and his business broken up, by the trespass and wrong of the defendant, was decided in Schile *v.* Brokhahus, 80 N. Y. 614. The judgment should therefore be affirmed, with costs. All concur, except Gray, J., not voting. Judgment affirmed.

Surrender of the Premises — Covenant to Return Property in Good Condition.

Stevens *v.* Pantlind, 95 Mich. 145; 54 N. W. 716; *s. c.* 87 Mich. 476; 49 N. W. 602.

GRANT, J. The terms of the lease involving the questions now raised, are stated in 87 Mich. 476; 49 N. W. Rep. 602. The evidence there given is also substantially the same as in the present record, which, in addition, contains evidence, given on the part of plaintiff, tending to show that at the time of the alleged surrender of the property to plaintiff there were logs in the mill yard, lumber and slabs in the mill, and lumber upon the docks and in the yard. The evidence will be referred to in connection with the legal questions to be determined.

1. The court left it to the jury to determine whether the lease was in fact terminated. This ruling and the instructions given were correct if, under the plaintiff's own showing, the lease had not expired. No time was fixed in the lease for its termination. This depended upon a contingency, viz., the cutting of the logs which the defendants had in plaintiff's mill yard, and on lots adjoining, within the meaning and construction of the lease as determined from its "four corners." It did not by its terms expire the moment the last log was cut into lumber, and the workmen discharged. The defendants possessed the undoubted right to retain possession for the removal of their lumber, and for putting of the mill in the condition required by the contract before turning it over to plaintiff, who gave evidence tending to show that defendants' foreman and agent, Mr. White, had, after shutting the mill down, and discharging the workmen, made a contract for the removal of the lumber still there. When the mill was shut down, plaintiff was legally entitled to presume that defendants would perform their contract before surrendering, and that they desired to retain possession till that was done. Not having complied with the terms of the lease, according to plaintiff's evidence, some notice or act equivalent to a notice was necessary on the part of the defendants saying to him that they abandoned the premises and surrendered the property. The bare statement that they had ceased sawing, and had discharged their mill hands, and the knowledge of these

facts by the plaintiff, are not equivalent to such notice. If they had left the property in the condition required by the lease, or, in other words, if they had fully performed the contract, and then abandoned the premises, with the knowledge of the plaintiff, there would be much force in the contention that *ipso facto* the lease was at an end, and no formal surrender necessary. But the premises were not in this condition. According to plaintiff's testimony, this fact was admitted by White, who had the exclusive charge of defendants' business at the mill, and told plaintiff that Mr. Watson, who had negotiated the lease on behalf of defendants, would be there in a day or two, fix the matter up, and turn the property over. No statement was made to plaintiff that defendants did not intend to put the property in the condition contracted for, and, as already stated, he had the legal right to presume that they would do so. If the jury believed the testimony of White, the property was surrendered, and the plaintiff in possession. If they believed the evidence for the plaintiff, there was no surrender, and the mill was legally in the possession and under the control of the defendants. The question was fairly and properly submitted to the jury.

2. It is alleged as error that the court refused to instruct the jury that "Mr. White, in his capacity as agent or superintendent of the job of cutting these logs, had no implied authority arising from his position as such agent, which would authorize him to make any arrangement with the plaintiff looking towards the continuance of the defendants' tenancy after the logs were cut, and the mill shut down for good." Upon this point the court instructs the jury as follows: "The cutting of the lumber itself would determine the contract if no words were spoken. For instance, the defendants hired the mill for a specified time and purpose; when that time arrived, and the purpose was fulfilled by the cutting of the timber, then their rights, of course, by operation of law, merely, terminated, and they could not hold it longer without the plaintiff's consenting to a renewal of the lease. That is clear, and if no words were spoken other than discharging the employees and closing the mill, and leaving it in the plaintiff's hands, it went back to the plaintiff's hands, and he could not recover on the mere ground that it was in the hands of the defendants. But I think this also: that although White was the foreman mainly for the purpose of cutting the timber under the lease, and acting for the defendants in this suit, and being on the ground and acting for them when an objection was made by the plaintiff for the reason assigned by him, White had the power to make the arrangement claimed by the defendant to have been made; and if the plaintiff refused to take the mill

back on the ground assigned, and White said, 'All right. Wait a few days. Major Watson will be up to surrender the mill over to you,'—and he relied upon it, it would not be in the possession of the plaintiff meanwhile, but it would still be under the control and dominion of the defendants." The court erred, as already shown, in holding, as it did in the language above quoted, that cutting the timber and shutting down the mill terminated the lease. He entirely omitted certain obligations resting upon defendants, and specified in the lease, which have above been pointed out; but this part of the charge was favorable to the defendants, and was in exact accord with their theory. The conversation with White, as detailed by plaintiff, made no new arrangement with the defendants, nor changed the terms of the lease. Plaintiff testified that White told him that he had no authority to turn over the mill; that he did not offer to turn it over; and that Watson would attend to that when he came up. Defendants resided in Grand Rapids, while the mill was situated in Osceola County, a long distance away. Only one of the defendants visited the mill during the time of the lease, and he only once or twice. White was their sole agent there, with authority to employ and discharge men, and had the supervision of the entire business. If he had no authority to make the statement attributed to him, which counsel and court seem to have construed into some new arrangement, it is equally clear that he had no authority to bind his principal by turning the property over with the conditions of the lease unfulfilled. But the plaintiff, under the case made by him, did not recognize the lease as terminated, or that he was making a new arrangement contrary to its terms. The evidence of this conversation was competent only for the purpose of showing that the lease was not in fact surrendered. It was a part of the *res gestae*. The charge complained of was erroneous, and improperly limited the issue involved. It is evident, however, that the jury found plaintiff's statement of the conversation to be correct. This being so, the error was without prejudice; for, if plaintiff's version were correct, there was no surrender, and no change of possession. The court erred, but against the plaintiff, in saying to the jury that, in the absence of spoken words, the mill was left in plaintiff's hands and went back to him. Plaintiff was employed by the defendants, was himself discharged, but the rent was unpaid. He lived in a house near by, and saw all the preparations for closing. But the legal result of all this was not to restore to plaintiff the possession and control of the property, because the mill was not in the condition in which defendants agreed it should be when turned over, and

defendants had signified no intention not to perform their contract in this regard.

3. Defendants insist that the declaration is based solely upon the theory that the fire occurred while they were in possession of the property; that, if the fire had occurred after the termination of the lease, defendants could only be held liable in an action on the case for negligence, and not in an action based upon the violation of contract obligations, and that, therefore, it was error for the court to instruct the jury that, "even if the mill were turned over to the plaintiff, yet if, by reason of the carelessness and mismanagement of the defendants, fire had been taken from the mill, and put into the sawdust adjoining, it would constitute a breach of contract; and if the fire remained there without the knowledge of the plaintiff, and afterwards broke out and destroyed the mill, and it is traceable to the carelessness of the defendants, then they are liable." The declaration set forth the contract in full; alleged the duties of the defendants under it; that the defendants wholly neglected such duty and their obligations under the contract; neglected to keep a night watchman; neglected due care and diligence to preserve the property from damage and destruction by fire; allowed the slabs, sawdust and other debris to accumulate in and about and immediately adjoining the mill; negligently threw and deposited the fire from the furnace into, upon and about such sawdust and other debris. All these acts were alleged to be breaches of the contract. Plaintiff planted his right of action solely upon the violation of the contract, and, by his proof, connected the injury directly with such violation. It is immaterial, therefore, whether the injury resulted before or after the termination of the lease. In either event, an action would lie upon the contract. It is true the declaration alleged that defendants had not returned the property to plaintiff; but this was not the gist of the action, nor did it of itself afford an independent ground of recovery. We think the instruction was correct.

4. The court instructed the jury that whether the mill was turned over to plaintiff or not, if he knew of the fact that fire was smoldering in the sawdust after defendants' agent went away and left it, and knew of the approaching danger by reason of it, and took no measures to prevent it from burning the mill, it would be a bar to this action. Defendants insist that the proofs conclusively show that plaintiff did know of the fire there; that it was likely at any time to break out; that he took no steps to watch it or prevent it; and that, therefore, he was in law guilty of contributory negligence. The mill was closed down about 4 o'clock p. m. July 11th. Plaintiff testified that the mill

had caught fire from the sawdust pile shortly before a temporary shut down for the 4th of July; that he had no knowledge of any fire after that; that on the 11th, when the mill closed down, he told White that "it was very dangerous to leave the mill in that condition; that the mill had already caught fire, and was liable to again; and that sawdust held fire in it any time almost." Defendants kept a watchman upon the property during the night of the 11th, and plaintiff testified that he did not know until after the fire that they had withdrawn the watchman. The fire occurred on the morning of the 13th, about 4 o'clock. Certainly the plaintiff was not called upon to watch the property, or take any steps to protect it, until he knew that the watchman was withdrawn, and that defendants had withdrawn all protection over the property. Whether this was so was a question of fact for the jury. If the plaintiff's evidence be true in regard to throwing the fire from the furnace into the sawdust and slabs, White, whose negligence was the negligence of the defendants, was guilty of gross negligence, and a gross disregard of plaintiff's rights and his own employer's interests. The testimony on plaintiff's part showed that he knew that the sawdust pile had repeatedly taken fire, and that he had helped to put it out. Under these circumstances, the law will not relieve defendants from their own negligence without showing that plaintiff knew that they had abandoned the property, and should thereafter exercise no care or control over it. It is not entirely clear that any obligation rested upon him to look after the property until the lease was terminated. Plaintiff had no actual knowledge that there was fire in the sawdust. He knew that there was danger of its being there, and so informed White. White, recognizing the danger, and knowing the provisions of the contract, kept a watchman the following night, and then withdrew him, without any notice to plaintiff. Under these circumstances, it would be difficult to discover any legal obligation upon the part of plaintiff to watch the property. The charge was as favorable to the defendants as was justified by the evidence.

Judgment affirmed. The other justices concurred.

Tenant Must Surrender Possession Before Asserting and Enforcing Title Adverse to Landlord.

Barlow *v.* Dahm, 97 Ala. 414; 12 So. 293; see Dahm *v.* Barlow, 93 Ala. 120; 9 So. 598.

HARALSON, J. The complainants filed this bill on the 1st day of October, 1890, against John Dahm, Timothy Meaher James

K. and Augustus Meaher, for the sale for partition of certain real estate described in the bill, alleging that they owed an undivided third interest therein, and the defendants the other two-thirds as tenants in common, and that it could not be equitably divided in kind. Complainants claim to have derived title to their one-third undivided interest in said land on the 17th day of May, 1890, by deed of conveyance from one Glennon and his wife. The defendants, answering the bill, claim that they and those from whom they claim have been in the open, notorious, and continuous adverse possession of said land ever since 1847, claiming it as their own, and exercising acts of ownership over it; that the complainants knew that defendants were in the adverse possession of said land, claiming it as their own property, when they received said deed to an undivided third of it from said Glennon and wife; that complainants were tenants of defendants under a written lease, and have been paying their rents therefor, and they have never repudiated said tenancy, nor claimed as their own any portion of said land, but occupy the whole of it as tenants of defendants, and not otherwise, and have never surrendered, or offered to surrender, the possession of said property to defendants. The proof shows that the complainants, Barlow & Co., rented and went into the possession of the whole of this land from defendants, or those under whom they claim, on the 1st day of August, 1883, by a written lease of that date, for the term of five years — from that date to the 1st of August, 1888 — at the annual renting of $150, payable quarterly, with the privilege of renewal of the lease for five years more at the same rental; and that on the 1st day of August, 1888, according to the terms of said lease, complainants accepted a written renewal of said lease, on the same terms as before, for another period of five years, expiring on the 1st day of August, 1893, and had paid their rents up to the 1st of October, 1890, the end of the last quarter, and were in possession of the property. After this bill was filed these defendants commenced ejectment in the circuit court of Mobile County against these complainants, Barlow & Co., to recover the possession of said land, which they then occupied under said lease from defendants, the contention being on their part that, because complainants claimed to have purchased a part of the leasehold from a third person, during the continuance of their lease from defendants, in hostility, as defendants claimed, to their title, and had filed this bill while thus in possession, asking a sale of the property for partition between themselves and defendants as tenants in common,

they thereby repudiated and forfeited their lease, and defendants were entitled to recover the possession of the land. In that case the defendants, complainants here, did not question the title of the plaintiffs, these defendants, to two-thirds of the land, but claimed that they had leased only a two-thirds interest in the land from the Meahers, from whom these defendants derive title, and that they had acquired the interest of the other cotenant of the Meahers. The case was decided in the circuit court against these defendants. On an appeal to this court we held that these facts did not constitute a forfeiture of the lease, and that the payment and reception of the rent up to November 1 (October 1), 1890, was a recognition of the lease, and an admission of an existing tenancy, which precluded these defendants from insisting in that action upon a forfeiture of the lease. Dahm *v.* Barlow, 93 Ala. 120; 9 South Rep. 598. Without going into the details of this case, and a discussion of the several assignments of error, we confine consideration of the cause to a single principle, which is decisive of it, consistently with what we held in Dahm *v.* Barlow, *supra*. The only ground upon which complainants seek to maintain this bill is that on the 17th of May, 1890, during the existence of their lease from defendants, and their possession under it, they acquired by purchase from a third person an undivided third interest in the land. Admitting that defendants own two-thirds of it, and asserting their own claim to a third interest therein, they file this bill for a sale of said land for partition while still holding possession of the entire premises under their lease from the Meahers, without having surrendered the possession to their landlords. This, as tenants, they are not permitted to do. "The landlord can only be required to litigate title with his tenant upon the vantage ground of possession." Houston *v.* Farris, 71 Ala. 570; Caldwell *v.* Smith, 77 Ala. 167; Norwood *v.* Kirby, 70 Ala. 397. The decree of the chancellor is affirmed.

SECTION II.

TENANCY AT WILL AND FROM YEAR TO YEAR.

Say *v.* Stoddard, 27 Ohio St. 478.
Bryant *v.* Vincent, 100 Mich. 426; 59 N. W. 169.
Weed *v.* Lindsay, 88 Ga. 686; 15 S. E. 836.
McKissich *v.* Ashley, 98 Cal. 422; 33 P. 729.

Assignee of a Tenant at Will Acquires No Title as Against the Lessor.

Say *v.* Stoddard, 27 Ohio St. 478.

The lease provided that the tenancy was to last "as long as the parties shall mutually agree to continue renting under this

agreement," to pay a rental of $13.50 per month, and either party was to put an end to the tenancy by giving four days' notice in writing. Celey, the lessee, sublet two rooms to plaintiff, who remained in possession after the lessee had abandoned the premises. Defendant, the son of the lessor, eight days afterward took forcible possession of the premises against the remonstrance of the plaintiff, removing all the doors and windows of the rooms of the house.

Scott, Chief Judge. The contract of lease between Stoddard, Sr., and Celey, set out in the petition in the court below, created by its express terms a tenancy at will. True, the rent was to be $13, and was to be paid by Stoddard & Co. out of Celey's wages monthly or half-monthly, as might be most convenient. But the renting was to continue for "so long as the parties shall mutually agree to continue the renting under this agreement." And again: "Either party may put an end to said renting by giving the other party four days' notice, in writing, that this renting is to cease at the expiration of four days from the service of such notice on the other party." It is clear from this language that the tenant was to hold at the will of the lessor, though while the tenancy continued the rent was to be paid monthly or half-monthly. The character of the tenancy is not affected by the fact that four days' notice of its determination is provided for in the contract; for in a general tenancy at will reasonable notice must be given by the party whose will determines it, to the other party; and the contract here fixes the length of that notice. It is said by Blackstone: "An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession." 2 Bl. Com. 145; Litt. sec. 68. Such tenant has no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine at his will, and put him out whenever he pleases. 2 Bl. Com. 145; Taylor's Landl. & Ten. 48.

Tenancy at will may be determined by implication of law. Such implication will arise on the death of either of the parties. So, if a tenant at will assigns over his estate to another, who enters on the land, he is a disseisor, and the landlord may have an action of trespass against him. Greenl. Cruise on Real Prop. 244; Taylor's Landl. & Ten. 48.

So, also, a desertion of the premises by the lessee, puts an end to a tenancy at will. For he thereby discontinues his lawful possession and terminates his relation to his lessor, which is only of a personal character, and he ceases to have any interest in the premises which he can transfer or control.

The plaintiff shows by his petition that Stoddard, the lessor, died November 1, 1869, leaving the defendant his devisee of the premises. Celey, the lessee, continued in possession, till December 1, when he undertook to sublet a part of the premises to the plaintiff. It is not alleged that the defendant assented to this continuance of possession or subletting. On the 7th of December, the lessee, Celey, removed wholly from the premises; and eight days afterward the grievances occurred of which the plaintiff acquired no rights by his contract with Celey, for the latter had none which he could transfer. The facts stated do not show that the relation of landlord and tenant was ever created between the parties to this suit. There was neither privity of estate nor of contract between them. And the acts complained of were but the lawful exercise of the rights incident to the defendant's ownership of the premises and are not charged to have been attended with any unnecessary interference either with the plaintiff's person or property.

We think the court below properly sustained the demurrer to the plaintiff's petition, and its judgment is affirmed.

Tenancy from Year to Year, when Reservation of Rent Necessary.

Bryant *v.* Vincent, 100 Mich. 426; 59 N. W. 169.

GRANT, J. Plaintiff brought summary proceedings under the statute to recover possession of the premises described in the complaint as "that portion of the basement in the Brant block, about twenty-one feet in width by about seventy-five feet in length, under what is now the post-office in the city of Benton Harbor, being the south seventy-five feet of the basement room." Plaintiff is the owner of the premises known as the "Hotel Benton Block." July 21, 1890, he executed a lease to the defendant for five years of the hotel and portions of the basement, not, however, including the portion here in dispute. Defendant held possession under a parol agreement. What that agreement was is the main fact in dispute. Mr. Brant's version is that it was agreed that defendant might prepare the room for occupancy, and use it until complainant needed it for some other purpose. Defendant's version is that he was to prepare it for occupancy, and have possession during the life of his hotel lease, or until July 16, 1895. The agreement was made about August 1, 1892. Complainant, under the theory that defendant was tenant at will, gave defendant three months' notice to quit, and then instituted this suit. The court instructed the jury, that if they found the

agreement as claimed by complainant, he was entitled to recover. If, on the contrary, they found the agreement as claimed by defendant, it was a tenancy from year to year, and his possession was lawful until the end of the second year. Verdict and judgment were for the defendant.

It is conceded that, under the defendant's version, the lease, resting in parol, was void under the statute of frauds. Did it constitute a tenancy from year to year? We think it did. Defendant's testimony tended to show that he immediately performed his part of the agreement, and fitted up the room at an expense of $140. He had been in possession one year and a greater part of the second, without objection. It is argued on behalf of the complainant, that there was no annual rent reserved, and therefore, even under the defendant's evidence, the agreement constituted a tenancy at will. It is true that "the reservation of annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year." Jackson *v.* Bradt, 2 Caines, 169; Rich *v.* Bolton, 46 Vt. 84. In the latter case many authorities will be found cited. But clearly this rule is not applicable to a parol tenancy for years, void under the statute where the entire rent has been paid in advance. Under the defendant's evidence he had a lease which, if reduced to writing, would have been valid for five years. He entered into possession of the term. We think there is no well considered authority holding that he was not a tenant from year to year. The fact that no annual rent is reserved is not conclusive of the character of the tenancy. Where the owner of a farm rented a portion of it by parol for four years, the lessee agreeing to inclose the premises with a fence by way of rent, it was held that a tenancy from year to year was established. People *v.* Rickert, 8 Cow. 226; Jackson *v.* Bryan, 1 Johns. 322; Tayl. Landl. & Ten., § 56.

The court, at complainant's request, instructed the jury that defendant could not recover under any agreement made before the written lease, but only upon a verbal one made afterwards. The court, under objections, permitted evidence of conversations between the parties in regard to this room prior to the execution of the written lease, and this is alleged as an error, on the ground that all prior negotiations were merged in it. This would be true if defendant relied upon the written lease. But the testimony was competent as bearing upon the subsequent parol agreement. Had the defendant relied upon a previous or contemporary agreement, the evidence would have been incompetent.

The introduction of the written lease, on the part of the

defendant, is alleged as error. We do not see how this could have prejudiced the complainant. But, be that as it may, it was competent to introduce it for the purpose of showing the term of the parol lease, which defendant testified was to run to the end of the written lease. We find no error in the record, and the judgment is affirmed. The other justices concurred.

Possession Under a Contract for a Lease is a Tenancy at Will.

Weed *v.* Lindsay, 86 Ga. 686; 15 S. E. 836.

Bleckley, C. J. The contract of June 4, 1889, signed by the parties, respectively, a copy of which is in the report, was not a present demise or lease which granted to Lindsay & Morgan an immediate estate for years, but was an agreement to give them a future lease for ten years from the time the building to be erected was "ready for occupation." It is plain from the nature of the agreement and the language of the instrument that the contract was executory on both sides. It was not contemplated that Lindsay & Morgan should become tenants to Weed, or owners of any interest in the premises, or that they should be liable for the payment of the stipulated rent, if Weed did not erect the building and make it ready for occupation. Until that time should arrive they were to remain without any interest in the property whatever. If the building, as they contend, has not yet been completed and made ready for occupation according to the agreement, the time appointed for an interest to vest in them as lessees, and for their occupation to commence, has not yet arrived; and so they are without any legal ownership of an estate for years, or of a right to possession by virtue of such ownership. The instrument executed as evidence of the contract contains no words of present demise or any equivalent terms, nor does it fix with certainty either the amount of the annual rent to be paid, or appoint any time for the completion of the building and the consequent commencement of the 10 years' term. The amount of the rent was to, or might, depend in part upon the cost of the building, and when the building would be ready for occupation would necessarily depend on contingencies to be met and dealt with after the agreement was signed. It is manifest that the words "Upon these conditions, Joseph D. Weed agrees to give them a lease for ten years from the date the building is ready for occupation," ought to be construed, not as a stipulation for further assurance, but as an undertaking to cre-

ate a lease not previously existing, and to pass by it an estate not before conveyed nor attempted to be conveyed. It could not have been the intention of the parties either that Lindsay & Morgan should be owners of the contemplated terms of years, or any term in the premises, before the annual rent which they were to pay began to accrue, or that this rent was to begin to accrue before the building was ready for occupation. In distinguishing between a lease and a mere executory agreement for a lease, the intention of the parties, as manifested by the writing, is a controlling element. Lloyd Bldg. Cont., § 88; 12 Amer. & Eng. Enc. Law, 980; 1 Wood Landl. & Ten., § 179; McAdam Landl. & Ten., § 41; 1 Tayl. Landl. & Ten., § 37 *et seq.*; 6 Lawson Rights, Rem & Pr., § 2801. For cases illustrating the distinction, see Sturgion *v.* Painter, Noy. 128; Jackson *v.* Ashburner, 5 Term R. 163; Hegan *v.* Johnson, 2 Taunt. 148; Jackson *v.* Bulkley, 2 Wend. 433; People *v.* Kelsey, 38 Barb. 269; 14 Abb. Pr. 372; McGrath *v.* City of Boston, 103 Mass. 369; Adams *v.* Hagger, 4 Q. B. Div. 480; Jackson *v.* Kisselbrack, 10 Johns. 336; Kabley *v.* Gaslight Co., 102 Mass. 392.

No lease creating a term of 10 years, and vesting the same in Lindsay & Morgan, having ever come into existence as contemplated by the agreement, what was the effect of admitting them into possession by virtue of the consent given by Weed in his letter to them of September 27, 1889, in which he says: "I simply write to tell you, as Mr. Brown told me you wished to begin to occupy the building before it was entirely finished, that the rent will begin from the time you begin to occupy it. I have no objection whatever to your moving into the building as soon as you find it can serve your convenience to do so." (Mr. Brown was the contractor employed by Weed to construct the building.) Was this permission a license to occupy for 10 years without the execution of any lease, or was it, as events turned out (possession having been taken under it, and Lindsay & Morgan having afterwards refused to join in the execution of a lease), the creation of a tenancy at will? We think it was the latter, and, no rent having at any time been paid and accepted, this is in accordance with the current of authority. 1 Tayl. Landl. & Ten., § 60; 1 Washb. Real Prop., p. 376; Tied. Real. Prop., § 216; 6 Lawson Rights, Rem. & Pr., § 2809; 12 Amer. & Eng. Enc. Law, 670; Chapman *v.* Towner, 6 Mees. & W. 100; Anderson *v.* Railway Co., 3 El. & El. 614; Anderson *v.* Prindle, 23 Wend. 616; Dunne *v.* Trustees, 39 Ill. 578. In Hamerton *v.* Stead, 3 Barn. & C. 483, Littledale, J., said: "Where parties enter upon a mere agreement for a future lease, they are tenants at will; and, if rent is

paid under the agreement, they become tenants from year to year, determining on the execution of the lease contracted for, that being the primary contract." Perhaps as the law of remedy in the superior court now stands the payment of rent would have raised, not merely a tenancy from year to year, but one from the whole term covered by the lease. Walsh *v.* Longsdale, 21 Ch. Div. 9. It is plain that, consistently with the written agreement of the parties, Lindsay & Morgan would have no right to occupy and use the premises for 10 years unless they were willing to pay therefor the stipulated rent, nor unless they were willing to occupy as lessees, and not merely as tenants at will. In this litigation they seek, as they did in some of the preliminary steps which led to it, to take the position, and have all the rights of lessees on terms different from any which Weed has ever assented to; that is, they want to hold at a less annual rent than they have agreed to pay. They make this claim because, as they contend, Weed has not erected and made ready for occupation such a building with respect to plan and finish as was contemplated. If this contention be well founded in fact, the result will be, not that they could occupy for 10 years on terms different from those agreed upon, but that they could, if they did not choose to waive their objection and unite in the lease and pay the stipulated rent, exercise their option between vacating the premises, and compelling, by a proper equitable action, a specific performance on the part of Weed of his undertaking. Weed's violation of his contract would also furnish a cause of action in their favor for any damages resulting from his failure to comply. Perhaps if they had, under protest, paid rent according to the contract, they might have done so without surrendering any substantial right, legal or equitable. Lamare *v.* Dixon, L. R. 6 H. L. 514. When this proceeding was commenced, they had not pursued any course open to them, but had endeavored to pursue one not open; they had declined to join in the lease; had not paid rent at the stipulated rate; had entered no suit for specific performance; and had refused to vacate the premises. Having brought themselves into the position of mere tenants at will, section 2291 of the code applies to them. The two-months notice having been given, they were subject to eviction as tenants holding over. Code, §§ 4077–4081. The pleadings in the case were simply the affidavit and counter affidavit provided for by the sections of the Code last cited. The pending application in the superior court to enjoin the prosecution of this proceeding was not operative, because no injunction, temporary or permanent, had been ordered, or any restraining order granted. What we have ruled embraces

all that is fundamental in the case and effectually controls the final result of this proceeding in the city court. The court erred in not granting a new trial.

Judgment reversed.

Tenancy from Year to Year Terminated by Notice.

McKissick *v.* Ashby, 98 Cal. 422; 33 P. 729.

Commissioner's decision affirmed by the court.

BELCHER, C. This action is in the nature of ejectment, and was commenced April 22, 1889. It is alleged in the complaint that the plaintiff now owns, and for more than eight years he and his grantors have owned, certain described lands in Lassen County; that defendant leased the said lands of plaintiff from year to year, commencing on the 1st day of March, 1886, down to the 1st day of March, 1887, for the sum of $180 rent, which defendant agreed and promised to pay plaintiff annually therefor; that on the 27th day of February, 1889, plaintiff duly notified defendant that he would not renew the lease, and requested him to vacate and surrender the premises; that defendant refused, and still refuses, to vacate the premises, or to deliver the same to the plaintiff, and has withheld, and still withholds, the possession thereof from the plaintiff, and has ousted and ejected plaintiff therefrom to his damage in the sum of $50; that defendant has failed and refused to pay to plaintiff the said rent for the year next before the 1st day of March, 1889, amounting to $180; and that the whole of that sum is due and owing to plaintiff from defendant. Wherefore judgment is asked that defendant be ejected from the said lands, and the plaintiff restored to the possession thereof, and also for damages in the sum of $50, and for rents due in the sum of $180, with costs. A general and special demurrer to the complaint was interposed by the defendant, but what ruling, if any, was made upon it does not appear from the record. An answer was also filed by defendant, denying all the avertments of the complaint. The case was tried by the court, without a jury, and the findings upon all the issues were in favor of the plaintiff, except that the damages were fixed at one dollar. Judgment was then entered in accordance with the findings, from which, and from an order denying his motion for new trial, the defendant appeals.

1. Appellant contends that the complaint fails to state facts sufficient to constitute a cause of action, because — First, if it is regarded as a complaint for unlawful detainer, then, in order

to maintain the action, it was necessary that a demand for the possession of the premises should have been made after the expiration of the term, and no such demand is alleged to have been made; and, second, if it is regarded as an ordinary complaint in ejectment, then an averment that defendant was in possession of the demanded premises, or of some part thereof, at the time of the commencement of the action, was necessary, and that no such averment was made. Section 1161 of the Code of Civil Procedure, cited by appellant, provides as follows: "A tenant of real property for a term less than life is guilty of unlawful detainer (1) when he continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice as prescribed in the Civil Code." Here the defendant was not a tenant at will, but for a fixed term, which expired March 1, 1889. The hiring of a thing terminates at the end of the term agreed upon. Section 1933, Civil Code. The notice served was only to the effect that plaintiff would not renew the lease, and that defendant must give up possession of the property. Such a notice was not necessary, but it served to inform defendant that, if he continued in possession of the property after the expiration of the term for which it was let to him, he would do so without the permission of his landlord, and would be guilty of unlawful detainer. Under the facts stated, we think the plaintiff had a right to re-enter when the term expired, and to maintain an action for possession without previous notice or demand. Section 793, Civil Code; Canning *v.* Fibush, 77 Cal. 196; 19 Pac. Rep. 376. And, if the complaint is regarded as an ordinary one in ejectment, we think the same conclusions must follow. It alleges, in substance, that plaintiff leased the demanded premises to the defendant; that the lease had expired; and that defendant refuses to vacate the premises, and "has withheld, and still withholds, the possession thereof from the plaintiff." This clearly implies that defendant is in possession; and it must be held a sufficient averment of that fact, certainly, in the absence of a demurrer that the complaint is ambiguous or uncertain in that regard. But no such objection was taken.

2. Appellant also contends that the findings were all contrary to the evidence, and not justified thereby. There was, however, evidence tending to support the findings, and, under the well-settled rule as to conflicting evidence, we think it must be held sufficient here. The defendant did not, in giving his testimony, deny, so far as we can discover, that he held the land in contro-

versy during the years 1887 and 1888 under leases from the plaintiff, but he claimed that the lease was not renewed for the year 1888. Admitting this to be so, still he could not deny the plaintiff's title without first surrendering to him the possession, and this he had evidently failed and refused to do.

3. When the plaintiff was upon the stand as a witness in his own behalf, his attorney asked him the following questions: "State whether or not, since he went on it, in 1886, up to the time you made the demand on him, he continues to occupy and use the land. State whether or not the defendant still occupies this disputed tract of land." The questions were objected to as irrelevant, incompetent, and immaterial, and the objections were overruled, and exceptions taken. It is urged that these rulings were erroneous but we see no error in them. It was entirely proper for the plaintiff to show that defendant continued in the occupancy of the land and was withholding its possession from him.

4. The plaintiff was permitted, over the objections of defendant, to read in evidence a copy of the record in the United States land office at Susanville, certified by the register of the office to be a true and correct copy, showing that on May 15, 1880, one John P. McKissick had entered the lands in question as desert lands; and also a deed executed by the said McKissick on December 9, 1881, conveying the said lands to the plaintiff. It is urged now that the copy offered was not competent evidence to show the entry; that the only competent evidence for that purpose would have been a certified copy of the certificate of purchase or receiver's receipt, the original of which was in the general land office at Washington; and that the deed was not admissible, for the reason that the plaintiff failed to connect himself with the government title, or show that the title had passed from the government. We see no prejudicial error in the rulings complained of under this head. The object undoubtedly was to show privity with the government, but, without such showing, the action might be maintained. We advise that the judgment and order be affirmed.

We concur: Searles, C.; Haynes, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

SECTION III.

ESTATES AT SUFFERANCE.

Russell *v.* Fabyan, 34 N. H. 218.

Tenancy at Sufferance Explained.

Russell *v.* Fabyan, 34 N. H. 218.

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseisor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bla. Com. 150; 4 Kent Com. 116; Livingston *v.* Tanner, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. Conway *v.* Starkweather, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseisor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseisor, without entry or notice, and may maintain against him

any action of tort, as if he had originally entered by wrong. Delaney *v.* Ga Nun, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire it becomes material to inquire what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he *retains* the possession as a wrong-doer, just as a disseisor *acquires and retains* his possession by wrong. Den *v.* Adams, 7 Hals. 99; 2 Bla. Com. 150; 4 Kent Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Ab. 416; Estate D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit. Jackson *v.* McLeod, 12 Barb. 483; 12 Johns. 182; 1 Cru. Dig. tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. Livingston *v.* Tanner, 12 Barb. 483; Den *v.* Adams, 7 Hals. 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as we held in Preston *v.* Love, Noy, 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseisor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance until he has entered upon the premises; 4 Kent Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseisor and unqualified wrong-doer.

By Stat. 6 Anne, chap. 31, made perpetual 10 Anne, chap. 14 (1708, 1712), no action or process whatever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, n. 377; 3 Bla. Com. 228, n.; 1 Com. Dig. 209, Action for Negligence, A. 6. It is not necessary to consider whether this statute has

been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseisor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseisor is liable for any damage occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseisor.

II. Assuming that Fabyan is liable for the loss of these buildings, the question arises, whether he is liable in this form of action; and, as we have remarked, he is not liable in trespass. Chancellor Kent (4 Com. 116) says: "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. *But before entry he cannot maintain an action of trespass against the tenant by sufferance.*" 1 Cru. Dig., tit. 9, chap. 2; Rising *v.* Stanard, 17 Mass. 282; Keay *v.* Goodwin, 16 Mass. 1, 4; 2 Bla. Com. 150; Co. Litt. 57, *b;* Livingston *v.* Tanner, 12 Barb. 483; Trevillian *v.* Andrew, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of *trespass on the case.* There is no evidence of any entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of West *v.* Trende, Cro. Car. 187; *s. c.* Jones, 124, 224, is a decision that case lies in such a case.

"Action upon the case. Where he was and yet is possessed of a lease for divers years *adtunc et adhuc ventur*, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during the time pulled down the windows, etc. Stone moved in arrest of judgment that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should

have an action, it should be an action of trespass, as Littleton, § 71. If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

III. It seems clear that if Fabyan is to be regarded as a wrong-doer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged, or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan, so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the court have not been furnished with a copy.

IV. The case of Russell *v.* Fabyan, 7 Foster, 529, is not to be regarded as a decision of the question raised in this case, in relation to a sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose whether, if Russell's deed proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer, by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be dis-

charged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defense. The defendant relied on an eviction on the 14th of June, 1848, as his defense. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defense. And the court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to inquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest within one year. Rev. Stat., chap. 195, § 13; chap. 196, § 5 (Comp. Stat. 501, 502). This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested (Rev. Stat., chap. 196, § 14), may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor, remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is

the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took precedence of Russell's deed, but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid, a right of redemption still remained to Russell, and he had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment, was *prima facie* a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 7 Foster. If the facts warrant that defense, the evidence is competent; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be a new trial.

CHAPTER VIII.

JOINT ESTATES.

Mette *v.* Feltgen, 148 Ill. 357; 36 N. E. 81.
Thornburg *v.* Wiggins, 135 Ind. 178; 34 N. E. 999.
Greenwood *v.* Marvin, 111 N. Y. 423; 19 N. E. 228.
Burton *v.* Perry, 146 Ill. 71; 34 N. E. 60.

Joint Tenancy and Tenancy in Common, as Modified by Statute.

Mette *v.* Feltgen, 148 Ill. 357; 36 N. E. 81.

On rehearing. For former opinion, see 27 N. E. 911.

BAILEY, J. This was an action of ejectment brought by Anna M. Feltgen against Henry, August, and Louis Mette to recover the undivided one-half of lots 8 and 9 in block 5 in Murray's addition to South Chicago. The defendants pleaded not guilty, and the cause being tried by the court, a jury being waived, it was found that the plaintiff was the owner in fee of an undivided one-half of the lots, and that the defendants were guilty of unlawfully withholding possession thereof from her. A motion by the defendants for a new trial being overruled, judgment was entered that the plaintiff recover possession of the undivided one-half of the lots, and that a writ of possession issue in her favor therefor. The defendants bring the record to this court by appeal.

The facts are all admitted by stipulation, and are, in substance, as follows: On the 23d day of April, 1878, Theodore H. Schintz, the common source of title of the plaintiff and defendants, executed and delivered to Peter Mayer and Anna Mayer, his wife, a deed which, omitting the signature and certificate of acknowledgment, is as follows: "This indenture witnesseth that the grantor, Theodore H. Schintz, a bachelor, of the city of Chicago, in the county of Cook and State of Illinois, for the consideration of one dollar, conveys and quitclaims to Peter Mayer and Anna Mayer, his wife, not as tenants in common, but as joint tenants, of the city of Chicago, county of Cook and State of Illinois, all interest in the following described real estate, to wit, lots eight and nine in block five in Murray's addition to South Chicago, situated in the county of Cook and State of Illinois, hereby releasing and waiving all right under and by virtue of the homestead and exemption laws of this State. Dated this twenty-third day of April, 1878." Anna Mayer, one of the grantees in the deed, died intestate April 4, 1879, leaving, surviving her, her husband and cograntee, and

also leaving the plaintiff, her daughter by a former marriage and her only heir at law, who was then a minor between 11 and 12 years of age. On the 16th day of February, 1882, Peter Mayer executed a deed conveying the lots to August Mette and Henry Mette, and on the same day the plaintiff, then being a minor between 14 and 15 years of age, executed a deed by which, for an exprssed consideration of $50, she conveyed and quit-claimed to August and Henry Mette all her interest in the lots. On the 11th day of September, 1885, the plaintiff attained the age of 18 years, and on the 15th day of June, 1888, she executed, acknowledged, and recorded an instrument expressly revoking, annulling, and declaring void her deed executed during her infancy; and July 13, 1888, as a further act of disaffirmance, she instituted this suit, and shortly thereafter commenced a suit in chancery to set the deed aside, and to recover her interest in the lots. August and Henry Mette, immediately after the execution of the deed to them, together with their codefendant, Louis Mette, took possession of the lots, and excluded the plaintiff therefrom, and were in possession thereof, to the exclusion of the plaintiff, at the time of the commencement of this suit, and are still in possession. On the 12th day of January, 1884, August and Henry Mette executed to Louis Mette a deed by which they conveyed to him a fractional interest in the lots.

The conveyance by the plaintiff to August and Henry Mette, made during her minority, having been expressly revoked and disaffirmed by her after becoming of age, may be disregarded, and the rights of the parties are to be determined precisely as though no such conveyance had been made. The claims of the defendants is that the estate of Peter Mayer and Anna Mayer, his wife, in the lots, was a joint tenancy, with the common-law incident of survivorship, and consequently that, upon the death of Anna Mayer, Peter Mayer, by right of survivorship, became tenant of the lots in severalty, to the exclusion of the heir at law of Anna Mayer, and that Peter Mayer's conveyance of the lots to August and Henry Mette vested in them the entire estate. The plaintiff, on the other hand, insists that, whether the deed from Schintz to Peter Mayer and wife created a joint tenancy or not, it was, under our statute, a tenancy in respect to which there was no right of survivorship, and therefore that on the death of Anna Mayer her joint interest descended to and became vested in the plaintiff, as her sole heir at law. There can be no doubt that the parties in the Schintz deed intended thereby, to create an estate in joint tenancy, and not a tenancy in common; and it must be admitted, we think, that the language employed was apt and sufficient for the accomplishment of that purpose. It

only remains to be determined whether, under our statute, the right of survivorship can still be regarded as an incident of an estate in joint tenancy. The doubt on this question grows out of the apparent conflict between section 5, c. 30, of the Revised Statutes, entitled "Conveyances," and section 1, c. 76, entitled "Joint Rights and Obligations." These statutes are *in pari materia*, and are to be construed together, and very much aid in such construction may be obtained by examining their history, as a part of the legislation of the State. On the 15th day of January, 1821, the general assembly passed "An act concerning partitions and joint rights and obligations," the first and second sections of which were as follows: "Section 1. Be it enacted," etc., "that all joint tenants or tenants in common who now are, or hereafter shall be, possessed of any estate of inheritance, or estate less than those of inheritance, either in their own right or in the right of their wives, may be compelled to make partitions between them of such lands, tenements or hereditaments as they now hold or hereafter shall hold, as joint tenants, or tenants in common. Provided, however, that no such partition, between joint tenants or tenants in common, who hold or shall hold estate for life or years, with others holding equal or greater estates, shall prejudice any entitled to the revision or remainder, after the death of the tenants for life, or after the expiration of the years. Sec. 2. That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common." Afterwards, on January 31, 1827, the general assembly passed "An act concerning conveyances of real property," the fifth section of which was as follows: "No estate in joint tenancy, in any lands, tenements, or hereditaments, shall be held or claimed under any grant, devise or conveyance whatever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be a tenancy in common." In the Revised Statutes of 1845, section 2 of the act of 1821 appears as section 1 of chapter 56, entitled "Joint Rights and Obligations," while section 5 of the act of 1827 appears as section 5 of chapter 24, entitled "Conveyances," both chapters having been approved on the same day. In the Revised Statutes of

1874, section 2 of the Act of 1821 again appears as section 1 of "An Act to revise the law in relation to joint rights and obligations," approved February 25, 1874, and section 5 of the Act of 1827 appears as section 5 of the "Act concerning conveyances," approved March 29, 1872, and in force July 1, 1872. Both sections have now been on the statute books concurrently since 1827, and both, since their original enactment, have been twice included, without change of phraseology, in general revisions of the statutes.

It seems plain that the Act of 1821 undertook to deal only with joint tenancies and tenancies in common held by the tenants in their own rights, or in right of their wives. Such is the express limitation contained in the language of section 1, and that limitation undoubtedly was intended to apply to and control the entire Act. No other tenancies were within the legislative contemplation. The Act, therefore, had no application to estates held by executors, trustees, or others holding estates *en autre droit*. But as to estates held by the tenants in their own rights, or in right of their wives, whether held as joint tenants or tenants in common, the Act gave the right to compel partition, and in cases of joint tenants, if partition was not made, the right of survivor was taken away; and it was provided that the part of the tenant dying first should pass by descent or devise, and be subject to debts, dower charges, etc., and be transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if the deceased joint tenant had been a tenant in common. The effect of this statute, clearly, was to practically abolish joint tenancies, where the estates were held by the tenants in their own rights or in right of their wives, or, that which is the same thing, to convert them into tenancies in common. The right of survivorship, which is and always has been the principal and distinguishing incident of joint tenancies, was taken away; and upon the death of the tenant, without having made partition, the estate was to be treated and considered, to every intent and purpose, as a tenancy in common.

The Act of 1827 made no reference to that of 1821, but, as it was the later expression of the legislative will, it had the effect of repealing or modifying the former act, in so far as it was inconsistent therewith. It becomes important, then, in the first place, to determine the proper interpretation to be placed upon that Act, standing by itself. In using without explanation or qualification the terms "joint tenancy" and "tenancy in common,"— terms having, at common law, a fixed and well understood meaning, — it was doubtless intended to use them in their

ordinary common-law sense. Its effect was to restore the right to create estates in joint tenancy, as known at common law, in so far as that right was abrogated by the act of 1821, rather by tacit recognition than by express words, and then undertook to change the rule of presumptions obtaining at common law where a conveyance of land was made to two or more persons. Where an estate was conveyed to a plurality of persons without adding any restrictive, exclusive, or explanatory words, such conveyance, at common law, was held to constitute the grantees joint tenants, and not tenants in common; it being necessary, in order to create a tenancy in common by deed, to add exclusive or explanatory words, so as to expressly limit the estate to the grantees, to hold as tenants in common and not as joint tenants. 2 Bl. Comm. 180, 193. By section 5 of the act of 1827, this rule, except in cases of conveyances to executors or trustees, was precisely reversed. Under that section, a conveyance to two or more persons, without restrictive or explanatory words, created a tenancy in common; and, in order to create a joint tenancy, the estate had to be expressly declared to pass, not in tenancy in common, but in joint tenancy. If the question had arisen at any time after the passage of the act of 1829, and prior to the Revision of 1845, it would have presented no material difficulty. The rule established by the act of 1827 would have been held to prevail, that being the latest act; and as that act clearly recognized the existence of estates in joint tenancy, a well-known species of common law estate, and expressly provided the mode in which they might be created, the result would have logically followed, that joint estates created in the manner prescribed were joint tenancies, in the common-law sense, and possessing the qualities and incidents which the common law attaches to them, notwithstanding the provisions of the act of 1821 to the contrary. The view that the estate in joint tenancy referred to in the act of 1827 was the common-law estate, with its common-law incidents, is strengthened by reference to the provisions of the act in relation to the tenancy when vested in executors or trustees. As we have already seen, tenancies of that character are not within the purview of the act of 1821, nor affected by its provisions. They were doubtless excluded from the operation of that act, on account of the manifest impropriety of compelling partition between joint tenants holding in a trust capacity, and the obvious advantages resulting from an application of the rule of survivorship to joint tenants of that character. The act of 1827 also expressly excepts from its operation executors and trustees, thus keeping

in force, as to them, the common-law rule, but provides that in other cases, to create a joint tenancy, it must be expressly declared in the deed to be such, and not a tenancy in common. But there is nothing in the act of 1827 furnishing the least indication that the legislature intended to attach to joint tenancies, where the tenants held in their own right, any other or different incidents than those which properly belonged to the estate where executors or trustees were the tenants. It is beyond question that, in the latter class of joint tenancies, it was the intention of the act that the incident of survivorship should prevail; and as the act furnishes no evidence to the contrary, it would seem to be equally clear that the same rule was intended to apply to those where the tenants were such in their own right.

Up to the passage of the Revised Statutes of 1845, the law on the subject, so far as it was declared by statute, was to be found in the act of 1821, as modified by the act of 1827, the latter act prevailing, and furnishing the rule in all matters where the two were inconsistent with each other. It would seem, therefore, that the re-enactment of these two statutes, without change of phraseology, in the revision of 1845, and again in the revision of 1874, was intended as a readoption of the statutory law on the subject in precisely the condition in which it was before any revision was made. It has been held, and we think correctly, that, where there are repugnant provisions in a revised code, those portions which are transcribed from later statutes must be deemed to repeal sections adopted earlier, or transcribed from earlier statutes, or to so modify them as to produce agreement between such repugnant provisions. End. Interp. St., § 183. In Ex parte Ray, 45 Ala. 15, a revised code had been enacted embracing various prior statutes enacted at different times, and, in giving construction to a particular portion of such code, it was said: "All the several sections on the same subject should be construed together. By being embraced in the code, they are formed into a system on the subject to which they refer, and by the adoption of the code the legislature has, as it were, laid its hands on them, and given them new life and vitality, as a body. For this reason, if for no other, they should be interpreted and construed together, and, if possible, made consistent, and in harmony with each other. If, however, this, in any particular case, cannot be done, then the earlier sections, or sections taken from earlier acts, must be held to be repealed, or so modified as to be in agreement with the later sections." See, also, O'Neal *v.* Robinson, 45 Ala. 526; State *v.* Heidorn, 74 Mo. 410. Section 2, c. 131, of the Revised Statutes of 1874, is as follows: "The

provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." As applicable to our present Revised Statutes, this section furnishes a rule of construction. Under it, as it would seem, a statute gains no additional force by being included in a revision, but is only continued as a part of our statutory law, having the same force and effect as before. Under this rule, the fact that one of the statutes now under consideration was re-enacted more recently than the other in the revision of 1874 is immaterial, as in both cases an old statute was continued in force, and no new one enacted. Under these circumstances, we are disposed to hold that the two statutes under consideration still sustain to each other the same relations which existed prior to the revision of 1845, and that they should be construed now the same as they would have been construed prior to that revision. As a consequence, the act of 1827 must still be regarded as repealing or modifying the act of 1821, to the extent of permitting parties to create the common-law estate of joint tenancy, with its common-law incidents, by expressly declaring in a deed running to two or more grantees, that the estate conveyed shall pass, not in tenancy in common, but in joint tenancy.

Applying these conclusions to the case before us, it follows that upon the death of Anna Mayer, intestate, her share passed to her husband by right of survivorship, and that he thereby became vested with the entire estate as tenant in severalty. It follows that no estate or interest in the land passed by inheritance to Anna M. Feltgen, the plaintiff, on the death of her mother, but that the conveyance from Peter Mayer to the defendants vested in them the entire estate. The plaintiff having failed to establish any interest in the land, the judgment in her favor is erroneous. It will therefore be reversed, and the cause will be remanded to the superior court. Judgment reversed.

MAGRUDER, J. Of the two sections of the statute under consideration in this case, that adopted in 1821 is now in force as section 1 of the act in regard to joint rights and obligations, and that adopted in 1827 is now in force as section 5 of the conveyance act. The readoption of these two sections by the legislature, at several different times since their original passage, indicates an intention on the part of the lawmaking power that they should both stand together, and that the one should not operate as a repeal of the other. There is no necessary conflict between them. They can be so construed as to harmonize with each other. Section 1 refers to both personal and real property.

Section 5 refers to real property alone. Section 1 standing by itself, is broad enough to abolish the right of survivorship, as between joint tenants, and to convert the estate of joint tenancy into an estate of tenancy in common. But section 5 was evidently intended to be a qualification of the broad rule laid down in section 1, so far as lands, tenements, and hereditaments are concerned, and was designed to limit the application of the rule to cases where the grant, devise, or conveyance did not, in express terms, create an estate of joint tenancy. Section 5 is merely a recognition of the rule that the law will effectuate the intentions of parties, where such intention is clearly manifest, whether in wills, deeds, or contracts. It is a mistake to suppose that the estate of joint tenancy has been prohibited by our statute. The creation of such an estate is not forbidden. It does not exist by operation of law, but it may exist by the express declaration of the parties. No other construction could be given to the language of section 5. By the terms of that section, an estate in joint tenancy may be held in lands under a conveyance, where the premises mentioned in the conveyance are thereby expressly "declared to pass, not in tenancy in common, but in joint tenancy." Joint tenancy shall be deemed to be tenancy in common, "unless otherwise expressly declared," except, of course, where the grant or devise is to executors and trustees. The law will construe the estate to be a tenancy in common, and not a joint tenancy, where no contrary intention is expressly declared in the instrument; but where the instrument expressly declares that the land shall pass, not in tenancy in common, but in joint tenancy, the law will permit the estate in joint tenancy to exist. It will not do to say that section 1 abolished the right of survivorship, and that section 5 merely permitted a joint tenancy without the right of survivorship to be created by an express declaration in the devise, grant or conveyance. The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors." 4 Kent Comm. 360. It can hardly be presumed that the legislature, in authorizing an estate by joint tenancy to be created by an express declaration in the grant or devise, referred to those technical joint tenancies arising from the unities of time, title, interest, and possession. If such a construction of section 5 is to prevail, then no right of survivorship was reserved to executors and trustees by that section. In both sections 1 and 5, joint tenancy is spoken of as the antithesis of tenancy in common; and the distinguishing feature of the latter is that a tenant

in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate. In Kent's Commentaries we find the following: "In New York, * * * estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. * * * In the States of Maine, * * * Illinois, and Delaware, joint tenancy is placed under the same restrictions as in New York, and it cannot be created but by express words; and, when lawfully created, it is presumed that the common law incidents belonging to that tenancy follow." 4 Kent Comm. 361, 362. It follows that the estate in joint tenancy, which may be expressly declared to exist by section 5, includes the right of survivorship as one of its common law incidents. In Arnold *v.* Jack's Ex'rs, 24 Pa. St. 57, the Supreme Court of Pennsylvania, in commenting upon a statute of that State whose language is the same as that of said section 1, say: "It is a question worthy of consideration whether the provisions of the act * * * apply to a joint tenancy created by express words in a devise." That is to say, it is a question worthy of consideration whether the provisions of section 1 would apply where the joint tenancy was created by express words in the grant or devise, even if that section had stood alone, and section 5 had never been enacted. In commenting upon the legislation in reference to joint tenancy, Pomeroy, in his work on Equity Jurisprudence, says: "This legislation, throughout all the States, has declared that a conveyance of land to two or more grantees shall, unless a contrary intention is clearly expressed, create an ownership in common, and not a joint ownership." 1 Pom. Eq. Jur., § 408. In Stimpson *v.* Batterman, 5 Cush. 153, the devise was to the "children and survivor or survivors of them;" and it was held that these were apt words to create an estate of joint tenancy, and that the children took as joint tenants. In Mittel *v.* Karl, 153 Ill. 65; 24 N. E. 553, it was held that a deed to a man and his wife, and "the survivor of them, in his or her own right," gave to the grantee dying first an estate for life, with remainder in fee to the survivor. What is the substantial difference between deeding or devising land to two persons, and the survivor of them, and deeding or devising land to two persons to be held in joint tenancy? The distinguishing feature of joint tenancy is the right of the survivor to take the whole estate. If the statute does not prohibit the conveyance or devise of land to two persons, and the survivor of them, so as to give the survivor the right to take the whole estate, it is difficult to see why the statute should

be construed as prohibiting land from being held in joint tenancy, so far as the right of the survivorship is involved in the joint tenancy, if the deed or devise expressly declares that such land shall be held in joint tenancy, and not in tenancy in common. Evidently, the statute does not prevent parties from conveying or devising their lands so as to enforce the right of survivorship, provided they indicate their intentions by clear and express declarations in the deed or will. The question here discussed has never before been fully and fairly presented to this court, as arising directly out of the facts involved. If, in any decisions heretofore made, expressions have been made use of which are seemingly at variance with these views, such expressions cannot be regarded otherwise than as mere dicta. It follows from what has been said that the deed from Schintz to Peter Mayer and Anna Mayer so far conveyed to them an estate in joint tenancy as that Peter Mayer, the survivor, took the whole title in fee to the lots, after the death of his wife. Therefore, the judgment below should have been for the defendants.

Tenancy in Entirety.

Thornburg *v.* Wiggins, 135 Ind. 178; 34 N. E. 999.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of $403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the

same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof, taken as property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy. Griffin *v.* Lynch, 16 Ind. 396.

The 9th Am. and Eng. Ency. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally * * * they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seised not *per my et per tout*, as joint tenants are, but simply *per tout;* both are seised of the whole, and each being seised of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. * * * Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole, the estate is inseperable — cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. Arnold *v.* Arnold, 30 Ind. 305; David *v.* Clark, 26 Ind. 424.

Strictly speaking, estates by entireties are not joint tenancies. Chandler *v.* Cheney, 37 Ind. 391; Hulett *v.* Inlow, 57 Ind. 412. The husband and wife being seised not of moieties, but both seised of the entirety *per tout* and not *per my*. Jones *v.* Chandler, 40 Ind. 588; Davis *v.* Clark, *supra;* Arnold *v.* Arnold, *supra*.

It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their material relation referred to. Morrison *v.* Seybold, 92 Ind. 298; Hadlock *v.* Gray, 104 Ind. 596; Dodge *v.* Kinzy, 101 Ind. 102; Hulett *v.* Inlow, *supra;* Chandler *v.* Cheney, *supra*.

But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations, in the conveyance, which clearly indicate the creation of a different estate. Hadlock *v.* Gray, *supra;* Edwards *v.* Beall, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the courts of some States have held that married women's acts, extending their rights, destroyed estates by entirety, but this court holds otherwise. Carver *v.* Smith, 90 Ind. 222.

And the greater weight of authority is in its favor. Our

decisions hold that neither, alone, can alienate such estate. Jones *v.* Chandler, *supra;* Morrison *v.* Seybold, *supra.*

There can be no partition. Chandler *v.* Cheney, *supra.*

A mortgage executed by the husband alone is void. Jones *v.* Chandler, *supra.*

And the same is true of a mortgage executed by both to secure a debt of the husband. Dodge *v.* Kinzy, *supra.*

And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it. State ex rel. *v.* Kennett, 114 Ind. 160.

A judgment against one of them is no lien upon it. Barren Creek Ditching Co. *v.* Beck, 99 Ind. 247; McConnell *v.* Martin, 52 Ind. 434; Othwein *v.* Thomas, 13 N. E. Rep. 564.

Upon the death of one, the survivor takes the whole in fee. Arnold *v.* Arnold, *supra.*

The deceased leaves no estate to pay debts. Simpson *v.* Pearson, Admr., 31 Ind. 1.

And, during their joint lives, there can be no sale of any part on execution against either. Carver *v.* Smith, *supra;* Dodge *v.* Kinzy, *supra;* Hulett *v.* Inlow, *supra;* Chandler *v.* Cheney, *supra;* Davis *v.* Clark, *supra;* McConnell *v.* Martin, *supra;* Cox's Admr. *v.* Wood, 20 Ind 54.

The statutes extending the rights of married women have no effect whatever upon estates by entirety. Carver *v.* Smith, *supra.*

Such estate is, in no sense, either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. Enyeart *v.* Kepler, 118 Ind. 34.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with Statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922, R. S. 1882, provides that "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

Under a statute of the State of Michigan, similar in all its essential qualities to our own, the court held that "Where lands are conveyed, in fee to husband and wife, they do not take as tenants in common." Fisher *v.* Provin, 25 Mich. 347.

They take by entireties; whatever would defeat the title of one would defeat the title of the other. Manwaring *v.* Powell, 40 Mich. 371.

They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest, neither can be said to own an undivided half. Ætna Ins. Co. *v.* Resh, 40 Mich. 241; Allen *v.* Allen, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent, in this State, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. Carver *v.* Smith, *supra*.

"Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge, in some particulars, the separate power of the wife, which existed already under the acts of 1852 and the year following. * * * 'It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common.'" Carver *v.* Smith, *supra*.

In Chandler *v.* Cheney, *supra*, the court says: "It was a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language em-

ployed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate of joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Preston on Estates, 132; 2 Blackstone's Com., Sherwood's note; 4 Kent's Com., side page 363; 1 Bishop on Married Women; Freeman on Co-Tenancy, § 72; Fladung *v.* Rose, 58 Md. 13 (24).

"And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stewart on Husband and Wife, §§ 307–310; Tiedeman on Real Property, § 244.

"And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. Hoffman *v.* Stigers, 28 Ia. 310; Brown *v.* Brown, 32 N. E. Rep. 1128.

"So it seems that husband and wife may, by express words, be made tenants in common by gift to them during coverture." McDermott *v.* French, 15 N. J. Eq. 80.

In Haddock *v.* Gray, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But which the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems

quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

The court then adopts the language of Washburn, *supra*, and Tiedeman, *supra*.

In Edwards *v.* Beall, *supra*, the court held that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties — joint tenancy would be superseded or put in abeyance by the estate created by law-tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression " convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution. Freeman on Ex. 125.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

Estate in Copartnership.

Greenwood *v.* Marvin, 111 N. Y. 423; 19 N. E. 228.

Appeal from supreme court, general term, fifth department.

Action by Elizabeth W. Greenwood, as executrix and trustee

of the will of Simon L. Greenwood, deceased, against Elizabeth S. Marvin, Percy L. Marvin, as executor of George L. Marvin, deceased, and individually, and the heirs and legatees of George L. Marvin and George L. Kingston, executor, of Le Grand Marvin, deceased, for an accounting of the partnership affairs of George L. and Le Grand Marvin. The action was originally commenced by Simon L. Greenwood, as assignee of Le Grand Marvin's interest in the copartnership property. A decree having been entered for plaintiff, the defendants Elizabeth S. Marvin and Percy L. Marvin appeal from the order denying a new trial.

Ruger, C. J. This action was originally brought by Simon L. Greenwood, assignee of Le Grand Marvin, to procure a dissolution of the partnership theretofore existing between Le Grand and George L. Marvin, a determination as to what constituted the assets of the firm, the conversion of such assets into money, the payment of the firm obligations, and an accounting between the respective members in regard to all their partnership transactions, and a determination of their several interests in the residue of such property. The complaint contained express allegations that certain real property therein specifically described was partnership property, and constituted a part of the firm assets. The original answer of the defendants, while admitting the existence of the partnership, stated, with respect to the allegations relating to the ownership of the real property, as follows: "And they deny the said Le Grand and George L. Marvin, as copartners, owned or held in the name of said George L. Marvin, as trustee or otherwise, the real estate mentioned or described in said complaint, or any part thereof, or that they were at any time copartners in any real estate purchased with money or means charged to the respective partners; and said defendants deny that in any real estate mentioned or described in said complaint, the legal title to which was in the said George L. Marvin, said Le Grand Marvin had had at any time any interest whatever, except such as he may have obtained under and by virtue of a certain instrument in writing executed by the said Le Grand and George L. Marvin, of which the following is a copy." Then follows a copy of a partnership agreement between the parties, executed in 1852, which is hereinafter recited, so far as it is material to the questions in this case. This answer is plainly evasive, and leaves the question of the ownership of the real estate, in terms, to depend upon the construction to be given to the agreement of 1852. Upon the trial of the action before the court without a jury, an interlocutory judgment was rendered, determining that certain portions of the real estate described in

the complaint were partnership property, and ordering a reference to take an account of the partnership affairs. This judgment was affirmed upon appeal to the general term, and from such judgment the defendants appeal to this court.

It is not our intention to enter into a detailed examination of the evidence in the case, inasmuch as that duty has been most fully and satisfactorily performed by Mr. Justice Smith in his opinion at general term, and we will therefore refer only to such additional facts and considerations as have been suggested upon the argument in this court. It has already been seen that the main question in this case is whether certain real estate, purchased during the existence of the partnership, and title taken in the name of George L. Marvin, was partnership property, and belonged to the firm, or was the individual property of George L. Marvin. As found by the trial court, the parties formed a partnership under the firm name of Le Grand & George L. Marvin, to do a land-agency and real-estate business at Buffalo, in 1838, which continued without practical change in its mode of doing business until 1864, when it was terminated by mutual consent. A written agreement of partnership was executed at the organization of the firm in 1838, by which the members were to become equal partners in a business already established, and which had for some time been carried on by Le Grand alone, and called "law and agency business, and business appertaining thereto." In 1842 other written agreements were made between the parties, by which it was provided, among other things, that the original firm was dissolved, but that its members should still continue the partnership, and complete the business of the old firm, but that George L. should be the legal owner of the property employed and acquired in such business, but should pay to Le Grand for his services his expenses, provided they did not exceed one-half the net profits of the concern, and should account to him for such net profits. In 1852 a third agreement was made between them, by which, among other things, it was provided that the partnership firm should continue at the equal benefit and risk of the respective parties, and declaring that "the real estate and the interest therein of said parties, whether standing in the name of said Le Grand or George, shall be and are for the equal benefit and interest of said parties, share and share alike, subject to all liabilities. * * * The personal property of said parties is now the equal property of said parties, share and share alike," with a single exception, not now important to notice.

It further appeared that no settlement of partnership accounts had ever been had between the members of the firm, and, although they kept books of account, they were kept in such a

manner that it was impossible to determine accurately therefrom how much either of the members of the firm had drawn from or paid to or for the firm, or what the respective interests of the parties were in the partnership assets. It did appear, however, that the purchase price of the real estate in question, which was mainly acquired in 1842, was paid from partnership funds; and the taxes and expenses thereon were generally paid indifferently by both members of the firm, and its rents, issues, and profits had been collected, received, and accounted for to the firm, as firm property, indifferently by each of the parties. Much other evidence was also given in relation to this subject upon the trial, including the making of express and implied admissions and declarations by George L. Marvin in connection with the possession, occupation, and leasing of such real estate, that the same belonged to the firm. Some declarations, written and oral, of Le Grand Marvin, made mostly between the spring of 1842 and the year 1852, to the effect that George L. Marvin was the owner of the property, were testified to on the part of the defendants; but we ascribe little weight to them, inasmuch as there were obvious reasons, fully disclosed in the negotiations leading to the purchase of the property, on account of which at the time it was thought best by all parties that the title thereto should be vested in George L. Marvin, and the same reasons which dictated that course would continue to influence any declarations thereafter made by Le Grand in reference to the subject. The only change made in the rights of the parties by the agreement of 1842, was to place the legal title of their property and acquisitions in George L. Marvin, instead of the firm. The equitable rights of the parties were to remain the same. The legal owner was to account to the other party for the net profits of the business, and no other mode of division is suggested than that of equality. If, therefore, that agreement effected any change in the relations of the parties, it operated as a temporary expedient to bridge over the period of Le Grand Marvin's pecuniary embarrassment, presumably with a view of restoring the original relations of the parties at some future time when it would be safe to do so. If that agreement was executed — as seems very probable — with the view of hindering and delaying the creditors of Le Grand, it was still competent for the parties, in the absence of interference by creditors, to rescind it at any time, and to restore to each other an equal legal interest in the property acquired under such agreement. We think this was intended to be accomplished by the contract of 1852. That agreement amounted to an unqualified acknowledgment by George L. Marvin that the parties had theretofore

dealt in an acquired real estate, and owned such property as partners, although it nominally stood in the name of George L. Marvin; and that such property was intended to be subjected to the obligations of the last partnership agreement. It did not purport to convey any property, or create any title; but it acknowledged that the property previously acquired by the parties both real and personal, belonged in equal proportions to the respective members of the firm. The appellants refer to the finding of the trial court that Le Grand Marvin did not acquire any interest in the real estate by the contract of 1852, and claim that the plaintiff, not having appealed from such finding, is bound thereby, and cannot now question it. It is undoubtedly true that he did not acquire his interest at that time, inasmuch as the contention of the plaintiff is that it was acquired at the time the property was bought; and that finding, therefore, is not inconsistent with the position that the contract of 1852 is most persuasive evidence of the secret trust upon which the property was originally obtained by George L. Marvin. If effect be given to all of the language employed by the parties in the agreement, it is not possible to give any substantial operation to this clause of the contract without holding it to apply to the lands in controversy standing in the name of George L. Marvin. The writing, like the other partnership agreements, was ambiguous in its language, and required extrinsic evidence to explain the nature of the business and the identity of the property referred to therein. Parol evidence for this purpose was entirely competent, and has been given with such fullness that nothing is left uncertain with reference to those questions. Fairchild *v.* Fairchild, 64 N. Y. 471.

The question, therefore, as to whether the lands in dispute constituted partnership property, was one of fact upon all of the evidence in the case, and was determined by parol evidence independent of the particular form which the transaction took, or the name in which the title was taken. Chester *v.* Dickerson, 54 N. Y. 1; Fairchild *v.* Fairchild, *supra*. The negotiations for its purchase were mainly conducted by Le Grand; and when it was consummated by the delivery of the joint and several notes of George L., Asa and Le Grand Marvin in payment of the purchase price, Le Grand took an active part in the subsequent management and control of the property, and contributed to the payment of the obligations given upon its purchase. Considering the equivocal character of the answer, the evident intent of the agreement of 1842, the unqualified acknowledgments of the contract of 1852, and the implied, as well as express, admissions of George L. Marvin subsequent to that time, it is conceding to

the appellants in this case all that can fairly be claimed for them, that they have made a question of conflicting evidence as to the ownership of the property in dispute, calling for a finding of fact by the trial court. The findings that such property was purchased for partnership purposes, and paid for with partnership funds, having been affirmed by the general term, are necessarily conclusive upon us as to the ownership and character of the property. Real estate purchased by a partnership firm for partnership purposes, with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as personal property. Widows are not dowable therein. Sage *v.* Sherman, 2 N. Y. 417. The interests of the respective members of the firm in such property are not required to be established by deed or instrument in writing under the statute of frauds (Chester *v.* Dickerson, 54 N. Y. 1; Robbins *v.* Robbins, 89 N. Y. 251), and the creation of trusts as to such interests is not prohibited by the statute of uses and trusts (Fairchild *v.* Fairchild, 64 N. Y. 471; Marvin *v.* Marvin, 53 N. Y. 607; Ct. of Appeals, MS. opinion by Allen, J.; Robbins *v.* Robbins, *supra*). After the dissolution of a firm, and the claims of its creditors are discharged, and the equities of the respective partners in its assets are determined and satisfied, such property, so far as it is preserved *in specie*, and is awarded or conveyed to the respective members, undoubtedly loses its character of personal property, and again becomes subject to the rules governing the devolution of real estate. But so long as the partnership affairs remain unsettled, like all other assets of the firm its real estate is equitably pledged to creditors, and liable to be absorbed and disposed of in the process of liquidating the firm debts, and satisfying the claims of the respective partners as against each other. As was said by Church, C. J., in the Fairchild case: "The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons, and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result by the laws of inheritance in England. * * * But the American rule, that the remainder descends to the heir, does not affect the character of the property as partnership effects, except that the incidents and qualities of real estate are revived. It is divided as so much money capital would be; but it resumes its original qualities. The same evidence, however, which would make it a partnership property, for the purpose of paying debts and adjusting the equities between the copartners, would establish it for the purposes of final division." In this action we are concerned only

with the character which the law ascribes to partnership property while in the hands of the firm as a legal entity having absolute power of disposition thereof for the purposes of the partnership business. When it becomes released from the trust imposed upon it as partnership property, it doubtless resumes the character of real estate; but it is quite probable that such a result may never happen in this case, as one of the principal objects of the action is to secure its sale for the purpose of paying firm debts, which appear to exist in considerable amounts.

It is claimed by the respondent that the question as to the ownership of this real estate has been previously adjudicated in an action between George H. Marvin and Le Grand Marvin, in which Geo. L. Marvin was a privy, and bound by the decision of the case. We think there is much reason for this contention, but do not consider it necessary to pass upon it, in view of the similar result reached upon the other branch of the case.

A further claim is made by the defendants that the plaintiff has not such an interest in the subject of the action as entitles her to maintain it. The argument is that the conveyance from Le Grand Marvin to Simon L. Greenwood was void, as being a transfer of real estate in trust for the benefit of the grantor, and was not one of the trusts authorized to be created by the statute of uses and trusts. We have already seen that such property, until discharged from the trust under which it was held as partnership property, cannot be regarded as real estate for any purpose. This action is not brought for the purpose of recovering the possession of real estate or affecting his title. The question of the ownership of the real estate is merely incidental to the main object of the action, and would have arisen in the same manner upon a partnership accounting, if the real estate had not been mentioned in the pleadings. King *v.* Barnes, 109 N. Y. 267; 16 N. E. Rep. 332. It was not improper to refer in the complaint to the character of the partnership assets, but it was wholly unnecessary in order to secure an accounting as to partnership affairs. If, however, we examine the character of the transfer from Le Grand Marvin to Greenwood, it will be seen that it does not purport to create a trust in real property, and, if such property does come to the hands of the assignee, it will result from the contingencies attending the judicial settlement of the partnership estate, and not through the force of the transfers to him. The evidence shows that Le Grand Marvin, before the commencement of the action, conveyed by an instrument in writing to Simon L. Greenwood, his heirs and assigns, forever, all of the property, both real, personal, and mixed, owned by him in partnership with George L. Marvin. It also

appeared that Greenwood, on the same date, executed and delivered to Le Grand an instrument in writing declaring, in substance, that he held the property and its proceeds, after deducting therefrom payment for his disbursements and services in managing, selling, and taking care of the same in trust to and for the use of Le Grand. The legal effect of the assignment referred to was to vest in the assignee the power of calling the other members of the firm to account, and to enforce the rights of Le Grand in any surplus in the assets which might remain after liquidation of the firm's obligations, and the adjustment of partnership equities. It gave no present interest in specific articles of property, but armed the assignee with power to procure its conversion into money by sale and distribution of any residue of the proceeds, in whatever form they might exist, to the respective members, according to their interests therein. The right thus transferred was a mere chose in action, subject, in respect to its mode of transfer, to the rules regulating the disposition of personal property alone. Section 1910, Code Civil Proc.

We are not able to see any point of view from which appellants' contention can be supported. A large portion of the property conveyed was confessedly personal property, in respect to which the provision of the statute of uses and trusts confessedly has no application. The trust as to such property, if one was created, was undoubtedly valid, and conferred a right of action upon the assignee to enforce an accounting as to all the partnership assets. But the declaration of trust was confined to the interest passing by the assignment, and, as we have seen, that instrument conveyed no legal interest in the real estate of the firm. It may further be said that this claim of the appellants is in the nature of a plea in abatement, and assumes the right of Le Grand Marvin to recover his interest in the partnership assets, but insists that the plaintiff has not succeeded to his rights. Such a plea is styled a "dilatory" one, as it does not affect the merits of the action, and is not favored in law. A proper regard for justice and the decent administration of the law requires that a litigation which has already raged for a quarter of a century over a question which the evidence seems to place beyond reasonable doubt, should be decided upon its merits, and not disposed of on a technical point which would remand the controversy to be begun anew between parties who are all represented in this action, and whose rights can be effectually settled herein. We are of the opinion that the defendants have no such interest in the question as entitles them to contest the validity of this assignment. Assuming that the real estate is partnership property, as we must, their only interest in that part

thereof which did not belong to their testator was to see that it was awarded to Le Grand Marvin, or someone who legally represented him. As between Le Grand Marvin and his assignee, the conveyance of such interest was undoubtedly valid, and transferred the legal right to demand an accounting to such assignee. Le Grand Marvin was made a party defendant to this action, and would undoubtedly be bound by any adjudication made therein. It was said by Church, C. J., in Sheridan *v.* Mayor, etc., 68 N. Y. 30, that "A plaintiff is the real party in interest under the code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor." See, also, Seymour *v.* Fellows, 77 N. Y. 178; Sullivan *v.* Bonesteel, 79 N. Y. 631. The right of the present plaintiff to continue the action as the executrix and legatee of Simon Greenwood was adjudicated by the order substituting her as plaintiff in his place. Smith *v.* Zalinski, 94 N. Y. 519.

We have examined the other exceptions in the case with considerable care, but find none of sufficient materiality to lead us to believe that any error justifying a reversal of the judgment was committed by the trial court. The judgment is therefore affirmed, with costs. All concur.

Partition — Involving a Number of Collateral Questions.

Burton *v.* Perry, 146 Ill. 71; 34 N. E. 60.

Magruder, J. The complainants, Perry and Henderson, file this bill for the partition of 40 acres of land, and claim to be the owners of an undivided half thereof. The defendants deny the ownership asserted by the complainants, and contend that they are themselves the owners of the whole 40 acres. Therefore the first question to be determined is whether the complainants own any interest in the land, and, if they do, what interest.

It is not denied, that, on February 16, 1836, Isaac Cook, then holding the government title to 80 acres, of which the tract of 40 acres now in controversy is the south half, conveyed an undivided half of said 80 acres to Asa W. Chambers and Sheldon Benedict. The complainants claim title through a conveyance from Benedict to Chambers, and three conveyances from Chambers to themselves. Chambers and Benedict left Chicago in 1838. Benedict has never been seen or heard of but once since

that time. It is said that in the year 1848 he made a visit to Chambers while the latter was living in the State of Texas, but after remaining with Chambers two or three weeks he disappeared, and all further trace of him has been lost. He paid no taxes upon the property in question after he left Chicago, nor do the records of Cook County, where these premises are located, show that he has ever made any conveyance of the land, or instituted any proceeding, or done any act indicating a claim of ownership, since the year 1838. Chambers, according to his own testimony, was not in Chicago from 1838 to 1872. During a period of more than 30 years his whereabouts were unknown, and were only discovered in the year 1871, or thereabouts, after considerable search by a party acting for, or in concert with the complainants. After his disappearance in 1838, he paid no taxes upon the land, nor did he or his grantees thereafter take any steps to assert title thereto until the filing of the bill in this case, in July, 1873. All the facts, however, in the present record, which tend to show laches by reason of delay in beginning suit, were before this court in 1884, and again in 1888. Perry *v.* Burton, 111 Ill. 138; *Id.* 126 Ill. 599; 18 N. E. Rep. 653. The only witness who testifies that a deed was made by Benedict to Chambers is Chambers himself. The latter swears that after leaving Chicago, in 1838, he remained about ten months in Georgetown, Vermillion County, Ill.; that he went to Texas in June, 1841, taking Mrs. Chambers with him; that he lived in Navarro County, Texas, from 1843 to 1872, about two miles from a little town called Mt. Pisgah, containing 15 or 20 houses, 13 miles from Corsicana, the principal town of the county, and about 110 miles from Bryant, Brazos County, where the complainants, Perry and Henderson, who are attorneys at law, reside; that he never saw Benedict, after leaving Chicago, until 1848; that, in November of that year, Benedict came to his house, in Navarro County, "flat broke and afoot," saying that he came through Galveston, and had been in New Orleans and New York, and divers places; that he then sold to Chambers all his interest in this land, and other lands in Illinois, for $200, of which $75 was paid in cash, and for the balance he took a saddle horse; that Benedict then made a deed to Chambers of the land; that neither had any papers showing the description, but both remembered the description; that the deed was acknowledged before a justice of the peace, who is dead, and attested by two witnesses, who are both dead; that Benedict then rode away, and Chambers has never seen nor heard of him since, or of any of his relatives, if he had any; that Chambers never recorded the deed, but kept it for 14 years on his place in Texas; that in 1862 he

left home, and deposited his papers in a trunk, in the care of a daughter then 25 years old; that the deed was lost during his absence, and he has never been able to find it.

The question as to the execution of the deed from Benedict to Chambers was passed upon by this court in the decision made in 1884. Perry *v.* Burton, 111 Ill. 138. Counsel for defendants refer to many circumstances brought to light by the evidence taken since the first and second hearings of the cause, which are alleged to demonstrate the falsity of the testimony given by Chambers. We do not deem it necessary, however, to enter upon a discussion of this subject, as we have reached the conclusion, for the reasons hereafter stated, that the defendants must be regarded as *bona fide* purchasers of the one-fourth interest formerly held by Benedict, without notice of the deed said to have been made by him to Chambers, and consequently are entitled to protection, as against the latter deed. Some time in 1871 or 1872, Chambers conveyed, or attempted to convey, all his interest in said tract of 80 acres, described as the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 20, etc., and in other lands in Illinois, to the complainants, and received therefor the sum of only $100. About the same time the complainants agreed with a real estate agent in Chicago to convey to him one-half of such interest in the land as they should finally recover, upon condition that he should take possession of the property, employ attorneys, perfect the title, and pay all costs, expenses, and attorneys' fees. We agree with counsel for the defendants that the agreement in question was champertous and void, and could not be enforced, as between the parties to it. Thompson *v.* Reynolds, 73 Ill. 11; Coleman *v.* Billings, 89 Ill. 183. But we do not regard such agreement as material in the consideration of this case, as the present suit is not between the complainants and the agent so employed by them. Torrence *v.* Shedd, 112 Ill. 466; 3 Amer. & Eng. Enc. Law, p. 86. It is not denied by the complainants that, in the fall of 1844, Isaac Cook was the owner of the other undivided one-half of the 80 acres which had not been conveyed in 1836 to Chambers and Benedict. The undivided half so conveyed to Chambers and Benedict was sold for taxes to Cook on November 28, 1842, and the sheriff issued a tax deed therefor to him on December 9, 1844. It is claimed by the defendants that Cook, holding under said tax deed, and under the deed to him of the other half, as color of title, paid all the taxes legally assessed upon the whole tract of 80 acres from 1844 to 1854, inclusive, while the land was vacant and unoccupied. We have heretofore passed upon the question of the payment of taxes by Cook under said tax deed, and have held

that the payment of taxes by him during the period aforesaid was not established by proof. Perry *v.* Burton, 111 Ill. 138. Counsel claim that there is now new evidence in the record which shows that Cook did pay the taxes on the undivided half conveyed to him by the tax deed for a period of seven successive years between 1844 and 1854. We find no evidence whatsoever in the record which shows that the 80 acres were vacant and unoccupied for seven successive years during the period from 1844 to 1854. Cook says nothing upon this subject, and the other witnesses, to whose testimony we have been referred, speak of the land as it was after 1854. In the absence of proof that the land was vacant and unoccupied, or that Cook was in possession of it, during said period of seven years, it is immaterial, so far as the bar of the statute of limitation is concerned, whether the taxes were paid or not; and any discussion of the question whether the defense based upon the payment of taxes under the tax deed to Cook has or has not become res adjudicata under the former decisions of this court would be unnecessary and fruitless.

In 1854 Cook sold the 80 acres to John W. Finnell and Richard C. Wintersmith for $4,000, and afterwards, by warranty deed dated July 9, 1857, conveyed to them the 80 acres so sold. On January 9, 1856, each undivided $\frac{1}{2}$ of said 80 acres, being the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 20, etc., was separately sold for the taxes of 1855 to Frederick R Wilson, and in pursuance of such sale the sheriff afterwards executed a tax deed, dated August 23, 1859, to Wilson, conveying to him the whole of the 80 acres. Afterwards, by deed dated April 26, 1865, Wilson conveyed the S. $\frac{1}{2}$ of the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 20, etc., being the 40 acres in controversy in this suit, to Finnell, and by deed of the same date conveyed the N. $\frac{1}{2}$ of said E. $\frac{1}{2}$, etc., to Wintersmith. By way of further effecting a partition of the 80 acres between them, Wintersmith or his grantees, by deed dated April 24, 1869, conveyed to Finnell said S. 40 acres, and by deed of the same date, Finnell conveyed said N. 40 acres to Wintersmith or his grantees. On August 29, 1869, Isaac Cook and John W. Finnell and Henry A. Montgomery and Abner Taylor, the two latter being grantees through mesne conveyances from said Wintersmith, filed a bill in the superior court of Chicago against the unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, as defendants. This bill set up that Cook conveyed an undivided $\frac{1}{2}$ of E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of said section 20 to Chambers and Benedict, as above stated; that by deed dated November 10, 1845, Norman B. Judd had deeded the other undi-

vided ½ of said 80 acres to said Cook; that in November, 1845, Chambers and Benedict each owed more than $1,000 to said Cook and in consideration of such indebtedness executed an agreement in writing for the conveyance to him of their undivided ½ of said 80 acres; that the consideration therefor was the property of said sums due from them, respectively; that said contract had been lost or mislaid, and had never been assigned by Cook; that neither Chambers nor Benedict, nor either of them, had ever conveyed any part of said land to said Cook, or to any other person. The bill recites the sale for taxes in 1842; the tax deed to Cook in 1844; the exercise of control over the 80 acres by Cook from 1843 to 1857; the payment of taxes by him from 1842 to 1854; the sale for taxes in 1856; the tax deed to Wilson in 1859; the deed from Cook to Finnell and Wintersmith in 1857; the deeds in 1865 from Wilson to Finnell of the S. 40 acres, and to Wintersmith of the N. 40 acres; the partition deeds in 1869 from the grantees of Wintersmith to Finnell of the S. 40 acres, and from the latter to the former of the N. 40 acres. The bill alleges that Chambers and Benedict died intestate and unmarried, and without children, and had been dead many years, and prays for a decree compelling the defendants to convey the S. ½ of said E. ½ to Finnell, and the N. ½ thereof to Montgomery and Taylor, and in default thereof that a master make such conveyance, and for summons. Appended to the bill was an affidavit that the names of the heirs and devisees of Asa W. Chambers, deceased, and of the heirs and devisees of Sheldon Benedict, deceased, were unknown. Summons dated August 28, 1869, was issued to Cook County against the unknown heirs and devisees or Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, returnable on the first Monday of October, 1869, and was returned, "Not found." Proof of publication of notice to said defendants was filed November 29, 1869, the publisher's certificate showing publication for four successive weeks, — four times in a certain newspaper, — first on August 28, and the last on September 18, 1869. On November 29, 1869, the court entered an order finding that it appeared from proof filed that publication had been made in the Chicago *Evening Post*, a newspaper published in Chicago, containing notice of the pendency of said suit, etc., "the first of which publications was more than sixty days before the commencement of this term of court," etc., and ordering that default be taken against the defendants, and that the allegations of the bill be taken as confessed by them, and that the cause be referred to Ira Scott, master in chancery, to take proofs and report. On Monday, May 21, 1870, the master

made his report, returning therewith the deeds named in the bill, or certified copies thereof, and also the deposition of Cook, wherein he testified that Chambers and Benedict were dead, and had been dead for fifteen or twenty years; that neither of them was ever married; that he had been unable to find any of their relatives living; that said Cook had reacquired the title to said eighty acres from said Chambers and Benedict by contract or deed which he has been unable to find, and that no one ever claimed said land since its purchase by Cook from Judd and Chambers and Benedict, except Cook's grantees, and those claiming under them. On May 21, 1870, the court rendered a decree wherein, after reciting that the cause came on to be heard upon the bill, exhibits, and testimony, and that the defendants, the unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased, "although duly notified and warned," failed to appear and plead, it was ordered that the bill be taken for confessed; and after finding that the material averments thereof were fully proven it was further decreed that the complainants therein be quieted in their title to and possession of said eighty acres, and that the defendants, "and all others," be forever enjoined from setting up any claim or title to said premises, or any part thereof, adverse to the claim and title of the respective complainants therein, and that the defendants, within five days, executed a deed to complainants Montgomery and Taylor conveying to them said N. $\frac{1}{2}$ and a deed to the complainant, Finnell, conveying to him said S. $\frac{1}{2}$, etc., and in default of their so doing, that said master make said conveyances for said defendants.

In pursuance of said decree, Ira Scott, master of said court, executed a deed dated June 14, 1870, and recorded June 23, 1870, conveying the S. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 20, etc., to said John W. Finnell, and also, by deed of same date, and recorded on June 23, 1870, conveyed the N. $\frac{1}{2}$ of said E. $\frac{1}{2}$, etc., to said Montgomery and Taylor. On February 23, 1871, Finnell sold said S. 40 acres to George G. Street for $12,000, and conveyed the same to him by warranty deed of that date, which was recorded before October 9, 1871. Street paid $3,000 in cash upon said purchase, and to secure the remaining $9,000 of the purchase money executed to Samuel M. Moore, as trustee, four trust deeds, dated February 21, 1871, and recorded March 23, 1871, — on one of the N. E. 10 acres of said S. 40 acres, to secure a note for $2,250, payable in one year; one on the N. W. 10 acres thereof, to secure a note for $1,250 payable in two years; one on the S. E. 10 acres, to secure a note for $2,250, payable in three years; and one on the S. W. 10 acres, to secure three notes,

each for $750, payable, respectively, in one, two, and three years, — all said notes signed by said Street, and payable to the order of said Finnell. On March 1, 1871, Street sold said 40 acres to William Hansbrough for $18,000 and conveyed the same to him by a warranty deed dated March 1, 1871, and recorded March 31, 1871, subject to said incumbrance of $9,000, which said Hansbrough assumed and agreed to pay. Hansbrough bought the property for himself and George W. Burton, and by a warranty deed dated January 30, 1872, and recorded January 8, 1873, conveyed the same, for an express consideration of $18,000, to said Burton, who also assumed the payment of said incumbrances. On October 3, 1871, before the maturity of said notes, Charles G. Wallace bought all of said notes and trust deeds from said Finnell, and paid therefor $8,600 in money. Burton paid the two notes payable in one year, — one for $2,250, and one for $750, — and the said N. E. 10 acres have been released from the lien of the trust deed thereon. In 1877, Burton executed upon the 40 acres a mortgage, which, in bankruptcy, was assigned in 1878 to the Louisville Banking Company, one of the appellants herein. In 1878, Burton became bankrupt, and an assignee of his estate was appointed. During this litigation the property had been sold for taxes, and John J. Mitchell, also one of the appellants, holds tax deeds upon the property. For the present we postpone the consideration of all questions as to bankruptcy of Burton, and as to the rights af the Louisville Banking Company, and of Mitchell. Wallace, one of the defendants below, and one of the appellants here, is the owner of the unpaid notes secured by three of said trust deeds, together with the interest thereon. He claims that he bought the same in good faith, relying upon the validity of said decree of May 21, 1870, and of the master's deed made in pursuance thereof. Burton and Hansbrough, defendants below and appellants here, claim that they and their grantor, Street, bought the 40 acres in good faith, relying upon said decree, and that they are *bona fide* purchasers for value, without notice of the claim of complainants, or of their grantor, Chambers.

We are thus brought to the consideration of the question whether parties purchasing in good faith, and in reliance upon the validity of such a proceeding against unknown heirs and devisees as is above set forth, are entitled to be protected in their purchases. In support of their contention that the superior court of Chicago acquired jurisdiction in the proceeding of 1869 over the unknown heirs and devisees of Asa W. Chambers, deceased, counsel for appellants assert, in the first place, that the Chambers from whom the complainants derived their title was an

impostor, and is not sufficiently identified by the evidence as being the same Asa W. Chambers who lived in Chicago in 1836 to overcome the presumption of death arising from absence for several periods of seven years each, and to overcome the judicial finding of the fact of his death made in 1869 and 1870, as above set forth. Undoubtedly, there are some circumstances which leave the mind in doubt upon this question of identity. John C. Haines and Fernando Jones swear that they knew Chambers and Benedict well when the latter were in Chicago in 1836 and 1838; that Chambers was a young man, not more than 25 years old, and was an unmarried man; that he had no family, and slept in his store, etc. The grantor of complainants was in Chicago in 1872 or 1873, and gave his deposition in that city in September, 1874. He seems to have kept aloof from all of the old citizens, except one, who knew the Chambers of 1836 and 1838. His board, while he was here, was paid by the real estate agent already mentioned. He states that he was engaged at that time in peddling bluing for washing purposes. He says that while he lived in Chicago he had a wife and children, and that one of his daughters was married in Danville before he went to Texas. Three or four witnesses swear that the reputation of the Chambers who lived in Texas in 1849 and 1862, for truth and veracity, was bad, and that they would not believe him under oath. Several testify that Chambers, of Texas, signed his name, "Asa Chambers," and was not known as Asa W. Chambers. There are many inconsistencies in the account which the grantor of complainants give of himself, and of the transaction of which he speaks. If this matter depended upon his testimony alone, its inherent improbability, and its contradiction by Haines and Jones, would leave his identity with the original grantee of Cook unproven. But Haines and Jones did not see him when he was in Chicago in 1872 and 1874. On the other hand, Mark Beaubien, an old settler in Cook County, swears that he knew the Chambers who was here in 1836, and that the Chambers here in 1874 was the same man. The Chambers who testified in this case boarded with Beaubien in 1874, and the latter swears that he recognized him as the man who had formerly boarded with him in 1836 or 1837. While there is some evidence tending to show that Beaubien was a very credulous man, there is none that successfully impeaches his truthfulness. We think, upon the whole, that his testimony must be held to determine the question of identity in favor of the position taken by the complainants upon this subject.

But appellants contend, in the second place, that, even if the grantor of complainants be identified as the grantee of Cook, yet

the rights of Chambers were cut off, as against them, by the decree of 1870. Their position is that the superior court of Chicago was a court of general jurisdiction; that it had jurisdiction of the subject-matter; that absence from the domicile for a period of seven years, without being heard from, creates a presumption of death; that Chambers had been absent, and not heard from, for 31 years, when the suit of 1869 was begun; that the court made a decree, upon proofs taken, finding him to be dead; that proper publication was made as to his heirs; that complainants were *bona fide* purchasers for value without notice, and were not bound to look beyond the decree, when executed by a master's deed, inasmuch as the facts necessary to give jurisdiction appeared upon the face of the proceedings; that the decree cannot be attacked collaterally, etc. There is force in these contentions, where applied to the unknown heirs and devisees of Sheldon Benedict, deceased, as will be seen hereafter, but they have no application to Chambers. According to the testimony of Beaubien, as it appears in this record, Chambers was alive when the suit was begun in 1869, and when the decree of 1870 was rendered, and when the present bill was filed, in 1873. He was not a party to the suit of 1869. The persons made parties as his unknown heirs and devisees were not then in existence. There were no such persons. The court had no jurisdiction over him, and the decree was absolutely void as to his one-fourth interest obtained from Cook in 1836. In authorizing the heirs of a deceased person, who has been interested in the subject-matter, to be made parties under the name of "unknown heirs," when their names are unknown, the statute presupposes that the death of such persons is an established fact. It was never designed to cut off the known rights of such a person while in life, even as against innocent purchasers for value. It has reference to deceased persons, and not to live persons. In Thomas *v.* People, 107 Ill. 517, where the proceeds of a sale in partition came to the hands of a master in chancery, and prior thereto administration had been granted upon the estate of one of the heirs upon the hypothesis that he was dead, because he had been absent, and not heard from, for more than seven years, the master paid to the administrator the portion of the proceeds belonging to such absent heir. Afterwards the person supposed to be dead turned out to be alive, and it was held that the grant of administration, and all acts done thereunder, were void; that the probate court had no jurisdiction except over the estate of deceased persons; that the money was improperly paid out; and that the interested party, who had returned alive, was entitled to recover back his money from the master. We think that the

doctrine of the Thomas case is applicable to the case at bar, so far as Chambers is concerned. We are therefore of the opinion that the decree of May 21, 1870, and the master's deed of June 14, 1870, did not have the effect of depriving Chambers of the one-fourth interest shown by the records to have been conveyed to him in 1836.

The proceeding of 1869 must be regarded as a proceeding against the unknown heirs and devisees of Sheldon Benedict, alone, and the question arises whether it was valid as to them. There is no evidence in the record that Benedict was alive when that proceeding was instituted, or when the decree therein was entered. He had been absent from Cook County, and had not been heard from in that county, for 31 years. If he was alive in 1848, he had not been heard from in 1869 for 21 years. Acting upon the presumption of his death, and upon the evidence of Cook that he was dead, the decree of 1870 found the fact of his death to be established. The complainants have introduced no proof to contradict the truth of such finding. In their original bill filed in this cause on July 18, 1873, they alleged that Benedict was dead, and after filing the affidavit required by the statute made his unknown heirs and devisees parties defendant. We see no reason why the court did not obtain jurisdiction over the unknown heirs and devisees of Sheldon Benedict, deceased, by the proceedings of 1869, as above set forth. Inasmuch as said heirs and devisees were notified by publication only, they had a right to come in at any time within three years after the entry of the decree, and open it, and answer the bill. It is true that such a decree does not become final until after the lapse of three years, and that parties purchasing during that time do so subject to the contingency that the decree may be set aside. Lyons *v.* Robbin, 46 Ill. 276; Bank *v.* Humphreys, 47 Ill. 227. But when the three years have passed, and no steps have been taken by the defendants to open it, it has the same effect as though there had been personal service. Caswell *v.* Caswell, 120 Ill. 377; 11 N. E. Rep. 342. Although, in the present case, Street and Hansbrough and Burton and Wallace acquired their interests within three years after the entry of the decree of May 21, 1870, yet none of the heirs or devisees of Benedict appeared between that date and May 31, 1873, for the purpose of opening the decree, and answering the bill. The decree become final on May 21, 1873, and the rights of said appellants became thereby fixed, and relieved of their conditional character. The bill of complainants in this case, not having been filed until July 18, 1873, was not filed until more than three years had passed not only after the entry of

the decree, but after the execution and recording of the master's deed to Finnell. It makes no difference that said bill was filed within less than two months after May 21, 1873. The evidence tends to show that the efforts made by the agent of the complainants to find Chambers, and get a conveyance from him, were prompted by the beginning of the chancery suit in 1869, and by the publication of the notice to unknown heirs, etc. Neither Finnell, nor the above named appellants, who hold under him, had any notice whatever that Benedict had made a deed to Chambers until the filing of the original bill in this cause. The allegations of that bill made it known on July 18, 1873, for the first time, that such a deed, of which the records give no information, had been executed and lost. The first two deeds made by Chambers to the complainants gave no notice of the execution of a deed by Benedict to Chambers. They both bear date November 20, 1871. One was recorded on January 30, 1872, and the other on February 16, 1872. By the former, Chambers conveyed to Perry and Henderson "all of the equal and undivided one-half part," not of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, etc., but "of the N. E. one-fourth of section 20," etc., and omitted to state in what county and State said N. E. $\frac{1}{4}$ was located. By the latter, Chambers conveyed to Perry and Henderson "an undivided one-half of all the pieces, parcels, or lots of land which I own, or have any title thereto, in Cook County, or in any part of Illinois," but failed therein to specifically describe any particular land. The third deed made by Chambers to Perry and Henderson, which recites that it is made to correct the mistake in the first deed of omitting the words "in Cook County, and State of Illinois," bears date July 5, 1873; and, although it is referred to in the original bill in connection with the other two deeds, it was not recorded until September 9, 1890.

Which title to the undivided one-fourth interest conveyed by Cook to Benedict in 1836, is the better title, — that of appellants, derived from Finnell through his master's deed of June 14, 1870, and purchased in good faith for valuable consideration, without notice of any adverse interest, or that of complainants based upon the lost deed of Benedict to Chambers, brought to light for the first time on July 18, 1873? The statute provides that "all deeds, mortgages, and other instruments of writing which are (required) authorized to be recorded shall take effect and be in force from and after filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers

without notice until the same shall be filed for record." If Benedict had been alive in June, 1873, and Finnell had then purchased his one-fourth interest from him for a valuable consideration, and in good faith, and without notice of any previous conveyance thereof, and had recovered his deed on June 23, 1873, Finnell would certainly have held the interest as against the unrecorded and lost deed previously made by Benedict to Chambers in 1848, and not heard of by Finnell until June 18, 1873. Although the legal title passes by the first deed, which is not recorded, yet by force of the recording laws it is postponed in favor of a subsequent deed to a bona fide purchaser, which is recorded. We have held that this rule applies as well to bona fide subsequent purchasers from heirs as to purchasers from the ancestor. In Kennedy *v.* Northup, 15 Ill. 148, we said: "During the lifetime of the grantor in an unrecorded deed the apparent title is in him; and he who purchases in good faith that apparent title, it is conceded on all hands, is protected by the statute. After the death of such original grantor the apparent legal title is in the heir, and the policy of the law, which is to make potent all legal titles to land, so far as practicable, that strangers may safely purchase, equally requires that the bona fide purchaser from the heir should be protected." If, therefore, Finnell had purchased said interest in good faith from the heirs of Benedict in June, 1873, and had recorded his deed in June, 1873, he would have been protected against the unrecorded deed made in 1848. But, when such heirs are unknown, why should not a subsequent purchaser who acquires their interest, in good faith and without notice, through a statutory proceeding against unknown heirs, be equally protected against the unrecorded deed? A deed from the heirs themselves no more effectually disposes of their interests than a deed executed for them by a master in chancery, under the orders of a court which has acquired jurisdiction over them. It has been held that the subsequent purchasers who are protected against unrecorded conveyances include purchasers at judicial sales as well as other sales. Webber *v.* Clark, 136 Ill. 256; 26 N. E. Rep. 360; and 32 N. E. Rep. 748. In principle and reason, these appellants, as purchasers from the grantee in the master's deed, executed under a judicial proceeding, occupy a position somewhat similar to that of the purchaser of a judicial sale. Section 7 of the chancery act is as follows: "In all suits in chancery, and suits to obtain title to lands, in any of the courts of this State, if there be persons interested in the same whose names are unknown, it shall be lawful to make such persons parties to such suits or

proceedings by the name and description of unknown owners, or unknown heirs or devisees, of any deceased person who may have been interested in the subject-matter of the suit previous to his or her death. But in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; the process shall be issued against all parties of the name and description given as aforesaid; and notice given by publication, as required by this act, shall be sufficient to authorize the court to hear and determine the suit as though all parties had been sued by their proper names." Starr & C. Ann. St., p. 395. Section 43 of the same act is as follows: "All decrees, orders, judgments, and proceedings made or had with respect to unknown persons shall have the same effect, and be as binding and conclusive upon them, as though such suit or proceeding had been instituted against them by their proper names." *Id.*, p. 412. The statute requires that the deceased person shall be one who was interested in the subject-matter of the suit previous to his death. Pile *v.* McBratney, 15 Ill. 314. The records showed, when the suit of 1869 was begun, that Benedict was the only person who had been interested in the one undivided fourth conveyed to him in 1836, except those holding tax titles. There was nothing to inform the complainants in the suit that Chambers had any interest in such undivided one-fourth, or that there were unknown persons interested therein, other than Benedict's heirs. In Pile *v.* McBratney, *supra*, the nature and effect of a proceeding precisely like the suit of 1869 were fully discussed, and it was there said: "The court having acquired jurisdiction of the case, and passed upon the rights of the parties, the decree was binding on the heirs of Mastin. The deed of the commissioners transferred all their interest in the land." When all persons known to have any interest in the land, or shown by the records to have any interest, are made parties, the proceeding would be useless, if, after it has become final, persons claiming to hold secret interests, unrecorded and unsuspected, even, can come in, and set the decree aside. Such a doctrine would open wide the door to fraud and perjury. Speculators would be tempted to swear to lost deeds, or other instruments, as having been executed to them by parties to such proceedings, for the express purpose of declaring the decree invalid for want of jurisdiction over themselves. Thus the very object of the statute would be defeated. While the decree of May 21, 1870, was invalid, so far as it operated to deprive Chambers of the one-fourth interest shown by the records to have been conveyed to him in 1836, we cannot regard it as invalid so far as it affected the secret

interest claimed to have been obtained by him through the lost deed of 1848. The apparent title to the latter interest stood in Benedict, or his heirs. "Where a deed is not recorded the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death the heir becomes the apparent owner of the legal title, and it is equally as important, and equally as just, that the public may be allowed to deal with him as the real owner." Kennedy *v.* Northup, *supra*. When the facts authorize a statutory proceeding against the unknown heirs holding the apparent title, the prosecution of such a proceeding to the end, and the securement of a title thereunder, amount to a dealing with such heirs as the real owners, just as much as would be a purchase from heirs whose names are known. The bill of 1869 was to a large extent a bill for the specific performance of a contract to convey land. Cook and his grantees alleged therein that Chambers and Benedict executed a written agreement in 1843 to convey their interests in the 80 acres to Cook. The court found that allegation to be true, and ordered the defendants to make deeds to carry out the agreement, or, upon their default, that the master do so. Here was a judicial finding that Cook acquired an interest in Benedict's one-fourth before the deed of 1848 was made. The appellants, purchasing in good faith and without notice, had a right to rely upon that decree, and the deed thereunder, as passing Benedict's title. The court had jurisdiction of the parties, — the unknown heirs of Benedict, deceased, — and of the subject-matter, — the specific performance of a contract to convey land.

Counsel for appellees charge that the proceeding of 1869 was a fraud perpetrated upon the court by Cook, and that no such contract of sale as is therein set up ever existed. The proof does not sustain this charge. Chambers, it is true, swears that he owed Cook nothing when he left here, in 1838, and that he thinks Benedict owed him nothing. Cook, however, swears to the contrary in the suit of 1869, and the court found his evidence to be true; and, not only so, but he swears to the same thing in his testimony taken in this case in 1882. But, if it is true that Cook was guilty of the fraud charged against him, it was not such a fraud as goes to the jurisdiction of the court rendering the decree of 1870, and therefore is unavailable in a collateral attack upon the proceeding of 1869, as against innocent purchasers from the grantee in the master's deed. There are two kinds of fraud, as applied to this subject, — fraud in obtaining a decree by false evidence, and fraud which gives a court colorable jurisdiction over the defend-

ant's person. In case of a fraud of the previous kind, a decree cannot be impeached in a separate and independent proceeding, though it is otherwise in the case of a fraud of the latter kind. Caswell *v.* Caswell, 120 Ill. 377; 11 N. E. Rep. 342.

Counsel for appellees contended that the contract set up in the bill of 1869 was a joint contract for the conveyance of an undivided one-half of the 80 acres by Chambers and Benedict, together, and that, where jurisdiction over Chambers failed, there was no jurisdiction to enforce the contract against Benedict alone for the conveyance of his one-fourth interest. We do not concur in this position. The deed made by Cook in 1836 conveyed to Benedict one-fourth, and to Chambers one-fourth, and each could perform the contract as to his own interest only, and not as to the interest of the other. Hence, we see no reason why the master's deed to Finnell did not pass Benedict's one-fourth, though it failed to pass the one-fourth belonging to Chambers. Freeman, in his work on Contenancy and Partition (section 209), says: "An agreement to convey, entered into by several cotenants, by which they stipulate that they will give a good and sufficient warranty deed, etc., does not require either to warrant the title of the others. It is complied with if each makes a separate deed of his moiety, containing the stipulated covenant, or if all join in a deed in which each grantor warrants his share, but not that of his cograntor." Coe *v.* Warahan, 8 Gray, 198. Viewing the contract as one between Benedict, vendor, and Cook, vendee, for the sale of one-fourth of the land, and viewing the bill of 1869 as a bill brought by the vendee against the vendor for the specific performance of a contract made in 1843, we cannot see how the proceeding can be void, as to the vendor's interest, merely because a subsequent grantee of the vendor, to whom the latter conveyed in 1848, was not made a party, it being true that the original vendee filing the bill knew nothing about the conveyance to such second vendee. The bill alleged that Benedict had not conveyed any part of his interest in said land to any person, and the decree found that allegation to be true. The appellants, as bona fide purchasers from the master's grantee, had a right to rely upon the correctness of the finding. In case of a common bill for the specific performance of a contract of sale of real estate, the only proper parties, in general, are the parties to the contract itself. Story Eq. Pl., § 226b; Gibbs *v.* Blakewell, 37 Ill. 191. "In a case before Shadwell, V. C., where the vendor sold the same property twice over, and the bill was brought by the first purchaser against the vendor and the second purchaser, it was dismissed, without costs, as against the latter, though specific

performance was decree as against the original contractor. This was affirmed by Lord Lyndhurst. * * * Cutts *v.* Thodey, 1 Colly. 223." Fry Spec. Perf. (3d Ed.), § 144.

Counsel for appellees contend that all questions as to the chancery suit of 1869 are *res adjudicata*, under the former decisions of this court made in this cause. We do not think that such is the effect of said decisions. The case was first tried before the superior court of Cook County, in 1883. Upon the hearing then had, the superior court dismissed the bill of the complainants for want of equity. An appeal was taken to this court, and in an opinion filed on September 27, 1884, we reversed said decree of dismissal, and remanded the cause generally, without directions. 111 Ill. 138. The case was again tried before the superior court in May, 1887, and a decree was entered by that court on August 2, 1887, again dismissing the bill of complainants for want of equity. A second appeal was taken to this court, and in an opinion filed November 15, 1888, we reversed the second decree of dismissal, and again remanded the cause, without directions. 126 Ill. 599; 18 N. E. Rep. 653. An examination of the opinions of 1884 and 1888 will show that there was no discussion in regard to the proceeding of 1869, and not even a reference to it. The questions of law and the questions of fact there discussed were other than those which relate to the suit begun in 1869, and the decree therein entered, and the master's deed executed in pursuance thereof. When an opinion of this court directs the decree of the circuit court to be reversed, and the cause to be remanded without directions, what is said in such opinion in regard to the weight of evidence must be understood as applying only to the facts disclosed in the record then under consideration, and only the legal principles therein announced are binding upon the inferior court. Shinn *v.* Shinn, 15 Ill. App. 141. In such case it by no means follows that other facts may not be proved within the principles announced, or not inconsistent therewith, or that amendments may not be made which obviate objections to granting the relief sought, or to the allowance of a defense interposed. Cable *v.* Ellis, 120 Ill. 136; 11 N. E. Rep. 188; Washburn & M. Manuf'g Co. *v.* Chicago, O. W. F. Co., 119 Ill. 30; 6 N. E. Rep. 191; Green *v.* City of Springfield, 130 Ill. 515; 22 N. E. Rep. 602. It is true that some reference was made to the suit of 1869 in the original pleadings. But since the cause was last remanded new pleadings have been filed, and the old pleadings have been amended by both sides, and new and more extended averments have been therein made, as to said suit. It appears clearly from the evidence of three wit-

nesses, Finnell, Browning, and Jones, and from former briefs of counsel, as testified to by the counsel for appellees, that no proper and legitimate evidence as to said suit was or could have been introduced upon the hearing of 1883 and 1887. Neither party then had an abstract of title, made in the ordinary course of business before the destruction of the records in Cook County by the great fire of October, 1871, which showed fully all the proceedings in said suit. In 1887 the legislature passed an act amending what is known as the "Burnt Records Act." Said amendatory act went into force on July 1, 1887, and it was not until after it went into force that the defendants were able to introduce a letter-press copy, and extracts and minutes from the destroyed records in the possession of abstract makers, showing the return of the summons, and the publication of notice against the unknown owners, and other facts in said suit of 1869. Without the evidence made competent by the act of 1887, there was no way of proving that the court acquired jurisdiction in said suit over the unknown heirs of Benedict. In addition to this the complainants, Perry and Henderson, upon the reinstatement of the cause in the lower court after the reversal of 1888, not only filed in May, 1889, a supplemental bill referring to the previous pleadings in the cause, and making new parties, but as late as November 20, 1880, they filed an amended supplemental bill, attacking the validity of the proceeding of 1869 upon specific grounds, and setting up reasons why they entered no motion therein during the three years after the rendition of the decree of May, 1870, and also giving reasons why the defendant should not be allowed to rely upon the same for protection to themselves as *bona fide* purchasers. Answers were filed by the defendants setting up their reliance upon said suit. The amended supplemental bill of November 20, 1890, and the answer thereto, made a direct issue upon the validity of the proceeding of 1869; and new evidence, never before brought forward, was introduced in support of this issue. Having filed said amended supplemental bill, the appellees are estopped from claiming that the issue thereby tendered cannot now be considered. For the reasons hereinbefore set forth, we are of the opinion that the appellants holding under Finnell, the grantee in said master's deed, have obtained good title to Benedict's one-fourth interest, as against Chambers, the grantee in the unrecorded deed of 1848. It follows that the complainants were only entitled to be regarded as owners of an undivided one-fourth part of said south 40 acres, and therefore the decree of the court below, holding them to be the owners of an undivided one-half part thereof, is erroneous.

The other questions in the case have reference to the rights of the defendants, as among themselves, in the remaining three-fourths of the tract, after awarding one-fourth thereof to Perry and Henderson.

As to the Wallace notes and trust deeds, Wallace has filed a cross bill asking for a foreclosure of the incumbrances held by him. The court below found that the legal title to the one-half not belonging to the complainants was vested in the Louisville Banking Company in trust for Burton, as hereinafter explained, and that as one-half of the $12,000 of purchase money agreed to be paid by Street to Finnell had been paid, as above stated, and the other half, with interest thereon, was represented by the notes specified in the cross bills, and owned by Wallace, and as Finnell conveyed the whole 40 acres to Street with full covenants of warranty, but in fact thereby conveyed the title to only one-half of the said property, therefore said Wallace could not enforce his trust deeds against the undivided half so decreed to be held by the company as trustee, etc., and said trust deeds were void, as against the rights of Burton and Hansbrough and said company, by reason of such failure of title to one-half of said land; and the court decreed, not only that the half held by it to be the property of complainants was free from the lien of said trust deeds, but that said Wallace had no claim whatever upon any portion of said tract of 40 acres. Burton and Hansbrough elected to assert their equities against Wallace. Although one of the errors assigned by Wallace is that the court below refused to enforce the lien of his trust deeds, yet his counsel do not present any argument to this court against the finding of the decree in this respect. Hence we conclude that they have abandoned their assignment of error. The deeds from Finnell to Street, and from Street to Hansbrough, and from Hansbrough to Burton, all contained full covenants of warranty. If the grantees had paid one-half of the purchase money, and received title to only one-half the land, they could certainly set up the failure of the warranty as to the other half of the land as a bar to the enforcement by Finnell of a suit to foreclose the notes and trust deeds given for the other half of the purchase money. As Wallace, purchaser of the notes from Finnell, is seeking to enforce them by foreclosure in a court of equity, said grantees could set up the same defense against him as against Finnell, the original payee. We are therefore inclined to think that the decree was correct in this particular, upon the hypothesis that the grantees of Finnell had lost title to one-half of the land. As, however, we hold that the title to one-fourth

only of the tract has failed, Wallace is entitled to enforce his notes and trust deeds to the amount of $3,000, with interest, according to the terms of the notes. To the extent thus indicated the decree below is erroneous.

As to the interest of the Louisville Banking Company. The controversy between the Louisville Banking Company and Burton is whether Burton still owns the equity of redemption, subject to the company's mortgage, or whether the company is the owner of the fee of the property, to the exclusion of any right to redeem on the part of Burton. The determination of this question requires a statement of the facts out of which the controversy grows: On January 15, 1877, Burton and wife, of Jefferson County, Ky., executed to R. K. White, of the same county, a mortgage upon said south 40 acres, and 80 acres of land in Morgan County, Ill., to secure three notes for $6,000, $4,500, and $1,500 respectively, payable to the Louisville Banking Company, "and all renewals or extensions of the same, in whole or in part, and save the said White, who is indorser and security thereon, from all loss, cost or damage;" the mortgage containing a provision that "if, during the time said White holds the title to the said premises, he should be compelled to pay taxes or assessments, or other sums, on account of being title holder thereof, the same, with interest and costs, shall constitute a lien upon the premises aforesaid, and must be paid by said Burton before he can require reconveyance of said premises." This mortgage was recorded in Cook County on January 18, 1877, and in Morgan County on February 19, 1877. Afterwards, by a written instrument of transfer, dated August 8, 1878, and signed by both Burton and White, the said Burton and White assigned to the Louisville Banking Company the full benefit of all their interest, right, and title in and to said mortgage, and therein agreed that said banking company should be, and was thereby, substituted to all the rights then held by said White under said mortgage, "the same," as is stated in said written instrument, "having been made for the security of certain debts named therein, and are in a supplementary paper, of date 24th day of October, 1877, and to indemnify the said White as the surety of said Burton in said debts owing by said Burton to said banking company; and we hereby agree to make all other and further transfers, assignments, and writing as may be necessary to carry into full effect the true intent and meaning thereof." The amount of the indebtedness named in said mortgage was thereafter reduced, and new notes were executed to said banking company by Burton and White in place of said three notes, to wit, one for $4,500, dated January 11, 1878,

and one for $5,970 dated April 24, 1878, both payable four months after date to the order of said company; the latter reciting upon its face a pledge by Burton, as security therefor, of two notes against P. G. Kelsey for $1,219 and $1,236.74, and one note against Kelsey and Giles for $1,196.74, etc. It appears from a credit on the note for $4,500 that there was pledged, as collateral security therefor, a claim against one R. C. Kerr, upon which $1,171.50 was realized on May 18, 1881. Neither the mortgage aforesaid, nor the assignment thereof, were under seal, but Burton has never contested the same, nor denied his liability thereon. On August 26, 1878, Burton filed his petition in bankruptcy in the United States district court at Louisville, Ky., and was adjudged a bankrupt on August 28, 1878. On September 13, 1878, the creditors met, and selected W. W. Gardner as assignee, and on the same day the register in bankruptcy made an assignment to said assignee of all the property and effects of the bankrupt. On April 24, 1879, Burton was discharged from bankruptcy upon his own application, and upon his filing the assent in writing of one-fourth in number, and one-third in value, of his creditors, to whom he was liable as principal debtor, and who had filed their claims. On June 26, 1880, Gardner was discharged as assignee of the bankrupt estate. His final accounts were filed on June 26, 1880, and found to be correct, and in his sworn report filed with the register on that day he says: "The bankrupt sets forth in his schedule filed in this court that he was the owner of a large amount of real estate lying in various States, all of which appears to be incumbered largely in excess of its value, and is beyond the control of this assignee. * * * This assignee is of the opinion that in no event can there be anything realized from the estate for the unsecured creditors. Hence he asks that his accounts be audited, and that he be discharged from all further liability on account of said trust." Gardner died in November, 1882, — more than two years after his discharge as assignee. But it appears that an attorney in Louisville went before said district court on December 15, 1882, and upon his motion, and announcement of the death of Gardner, an order was entered "that Harry Stucky be, and he is hereby, appointed assignee in bankruptcy of the estate of" George W. Burton. The records and files of the said district court show nothing further as to said Stucky except the motion and order above named. No order was ever entered, directing said Stucky to make sale of any of the property of the bankrupt, or confirming any such sale after it was made. By deed dated January 14, 1884, and recorded January 21, 1884, Stucky,

as assignee of Burton, and Burton and wife, united in a deed conveying said 40 acres in Cook County, and said 80 acres in Morgan County, to the Louisville Banking Company, reciting therein the bankruptcy of Burton, the appointment of Gardner, and assignment to him by the register, and his death, and the appointment of Stucky, and reciting, further, that all the right, title, and interest of Gardner, as assignee, became vested in Stucky, as assignee; that Stucky had advertised notice of sale for three weeks in a Louisville paper, and on January 14, 1884, had offered said premises for sale at public auction at the court-house door in Louisville; and that said company had purchased the same for $25. Afterwards, by another deed, executed on November 5, 1889, but dated back as of the 1st day of August, 1878, Burton and wife quitclaimed, for an express consideration of $5, all their interest in said forty acres to said banking company. It will be observed that the transactions referred to under this branch of the case all occurred during the pendency of this suit for partition, begun by the appellees Perry and Henderson. Burton had entered his appearance in the case as early as August, 1878. He filed an answer on January 26, 1881. The Louisville Banking Company was made a defendant on April 19, 1880, filed its answer on April 24, 1880, and a cross bill on July 3, 1882. Gardner was made defendant on February 11, 1881; and Stucky, on December 21, 1882. In all the pleadings of the banking company, filed in the case prior to July, 1890, it claimed to be mortgagee only, and sought to enforce its mortgage against such interest in the property as might be set off in the partition to Burton or his assignee. But in answers filed in July and October, 1890, and in an amended and supplemental cross bill filed on October 14, 1890, the banking company claimed that it had become the absolute owner of the property through the deeds executed to it by Burton and Stucky, and that whatever interest in the property would have been set off to Burton or his assignee before the execution of said deeds should now be set off to it, as owner both of the mortgagee's title, and of the mortgagor's equity of redemption. The court below held, and we think correctly, that Burton did not part with his right to redeem upon the payment of what is justly due to the bank.

Leaving out of view for the moment the fact that the deed of January 14, 1884, was signed by Burton, and considering it as a deed executed by Stucky alone as assignee, was it a valid deed? In other words, did Stucky have any interest, as assignee of Burton, on January 14, 1884, which passed from him to the banking company by his deed of that date? Burton had been discharged from bankruptcy more than four years before that deed

was executed, and more than three years before the entry of the order appointing Stucky assignee. Gardner had settled his accounts as assignee, and been discharged from his trust, more than three years before Stucky made his deed, and more than two years before Stucky's appointment. It must be conceded that the title to the property of the bankrupt passes to the assignee by the execution of the assignment of the register conveying the estate of the bankrupt. Such assignment relates back to the commencement of the bankruptcy proceeding, and by operation of law vests the title to all the bankrupt's property in the assignee. Bump Bankr. (10th Ed.), pp. 137, 138, 485. Here, on September 13, 1878, and by relation on August 26, 1878, the title of Burton to the 40 acres was in Gardner, as assignee. But where was the title after the discharge of Gardner on June 26, 1880? It is well settled that an assignee is not bound to take possession of, or claim all the property named in the bankrupt's schedule. He may reject such of the assets as may be a burden, rather than a benefit, to the estate. He may decline to receive property which is so heavily incumbered as to make it injudicious to receive it. In England, where leasehold estates pass to the assignee in bankruptcy, he is not bound to take the lease, and charge the estate with the payment of the rent, if the rent is greater than the value of the lease, but he may abandon it. In such cases, if the assignee declines to receive such property, or elects within a reasonable time not to take it, it remains the property of the bankrupt. Smith *v.* Gordon, 6 Law Rep. 313; Amory *v.* Lawrence, 3 Cliff. 523; Glenny *v.* Langdon, 98 U. S. 20; Nash *v.* Simpson, 78 Me. 142; 3 Atl. Rep. 53; Brookfield *v.* Stephens, 40 Ark. 336. The assignee is a trustee appointed for the purpose of disposing of the assets of the bankrupt, and distributing them among the creditors. He takes the title in his official character as a trustee, and as an officer of the court. The bankrupt law makes no provision for the conveyance of the property undisposed of by the assignee to the bankrupt. As the assignee takes no title as an individual, but only as an officer, the title reverts to the bankrupt when the trust is ended, and the officer is discharged. When the creditors are settled with, and the bankrupt is discharged, and the estate is wound up, and the assignee is discharged, the bankrupt becomes reinstated in his original title. It has been said that "the title must be somewhere, and under these circumstances it is necessary to regard it as the only party interested." Boyd *v.* Olvey, 82 Ind. 294; King *v.* Remington, 36 Minn. 15; 29 N. W. Rep. 352; Steevens *v.* Earles, 25 Mich. 40; Jones *v.* Pyron,

57 Tex. 43; Reynolds *v.* Bank, 112 U. S. 405; 5 Sup. Ct. Rep. 213; Bump Bankr. (10th Ed.), pp. 507, 669. In the case at bar, while Gardner was assignee, the 40 acres were incumbered by the Wallace trust deeds, by the mortgage of the Louisville Banking Company, and by a tax deed issued in 1873. Although the land has greatly increased in value since 1880, yet, when Gardner made his final report, the statement therein made, that the land appeared to be incumbered largely in excess of its value, was literally true. When he said that it was beyond his control, he said in effect, that he had never taken control or possession of it, but had declined to receive it as an asset. Although he was made a party to the present suit, yet it was not until he had been discharged as assignee, and therefore not until all his title, which was official, and not individual, had ceased to exist. By his discharge in June, 1880, the title thereafter reverted to Burton, and became reinvested in him. It necessarily follows from the foregoing considerations that the order made in December, 1882, appointing Stucky assignee, and the deed of January, 1884, viewed as a conveyance by Stucky alone, were void, and of no effect. Stucky cannot be regarded as a successor to Gardner in the office of assignee. Such a successor would only be appointed in case of the death, removal, or resignation of the former assignee before the winding up of the bankrupt estate. But where the trust is closed, and the acting assignee has done his duty and has been discharged, a new assignee certainly cannot be appointed without the institution of a new proceeding in bankruptcy in accordance with the provisions of the act. But no such new proceeding for the appointment of Stucky was instituted. We are therefore of the opinion that Stucky conveyed no title to the banking company by the deed of January, 1884. The weight of authority is in favor of the position that where the estate is settled, and the assigned discharged, the legal title reverts to the bankrupt without a reassignment, so that he or his heirs may bring ejectment. But if this were not so, the equitable title would clearly be in the bankrupt, and whatever title could be regarded as remaining in the assignee, or in any person subsequently appointed by the court to act as assignee, would be a naked legal title held in trust for the bankrupt. King *v.* Remington, *supra;* Reynolds *v.* Bank, *supra.* Hence, if by any process of reasoning, it could be held that Stucky took any title at all, it could have been only a naked legal title, vested in him as a trustee for Burton, the holder of the equitable title. Consequently, when Burton united with Stucky in the deed of 1884, his joint execution with Stucky operated as a direction to the

latter to convey such legal title for the same purpose for which Burton was conveying the equitable title.

This leads to an inquiry as to the real object of the execution by Burton to the Louisville Banking Company of the deeds made in January, 1884, and November, 1889. In order to determine whether a conveyance made by the mortgagor to the mortgagee operates as an extinguishment of the right of redemption, it must be made to appear that the parties intended such conveyance to be a payment of the debt. The intention to pay the debt by a deed of the property will not be inferred where the creditor retains the evidences of the indebtedness, and the securities pledged for its payment. Sutphen *v.* Cushman, 35 Ill. 186; Knowles *v.* Knowles, 86 Ill. 1; Dunphy *v.* Riddle, *Id.* 22; Bearss *v.* Ford, 108 Ill. 16. The deed will not be regarded as a release of the equity of redemption unless it is made for a consideration which is adequate, and which would be deemed reasonable if the transaction were between other parties. If the value of the mortgaged premises greatly exceeds the debt secured by the mortgage, the fact of such excess will tend to show that a release was not intended. 1 Jones Mortg. (4th Ed.), §§ 267, 340. A subsequent recognition of the mortgagee of the continued existence of the relation of debtor and creditor between the mortgagor and himself will be a circumstance tending to show the absence of such an intention. *Id.*, § 267. The relations between the parties, and other facts and circumstances of a nature to control the deed, and to establish such an equity as would give a right of redemption, may be shown by parol evidence. Knowles *v.* Knowles, *supra;* Conant *v.* Riseborough (Ill. Sup.), 28 N. E. Rep. 789. Applying these principles to the facts of the present case, we think it quite apparent that the deeds made by Burton to the banking company were merely intended as additional security for the mortgage indebtedness, and not as releases of the equity of redemption. Neither the mortgage, nor the notes secured thereby, nor the notes pledged as collateral security, were surrendered to Burton, or canceled, but were retained in the possession of the banking company. No consideration whatever was received by Burton for making these conveyances to the company. When they were made, both Burton and the company were parties to the present litigation, and engaged in contesting the title with Perry and Henderson and others. Burton was a party to the litigation when he executed the mortgage in January, 1877, and assigned it to the company, in August, 1878. He and White and Harris, the latter being president of the company, all lived in Louisville, and were intimate friends. He had been himself a stockholder

and director in the banking company. In the assignment of the mortgage to the company he had agreed to make all such other and further transfers, assignments, and writings as might be necessary. The proof shows that Burton signed the deeds of 1884 and 1889 in Louisville at the request of Harris. Harris told him that the attorneys in Chicago had requested the execution of the deeds, and that they were needed in the suit in Chicago, and for the correction of irregularities in former instruments. As there was no seal on the original mortgage, such a defect might be cured by a deed in the nature of a mortgage, executed under seal to the mortgagee. When the deed of 1889 was executed, the value of the property had begun to increase so as greatly to exceed the debt upon it. We are satisfied from a careful examination of all the evidence that Burton merely signed these deeds for the purpose of aiding the banking company in the defense of the present suit. His compliance with the request of the president of the company to execute additional papers will be presumed to have been in pursuance of his previous agreement upon the subject. After the execution of the deed of January, 1884, the banking company filed pleadings in this case, in which it recognized the relations of mortgagee and mortgagor as still existing between itself and Burton. In an answer filed by it on February 2, 1886, to Wallace's cross bill, the company sets up its claim as mortgagee, refers to the amount due upon its notes, speaks of its lien, and asks that a certain part of the property be allotted to Burton or his assignee in bankruptcy, subject to its lien. Also, in a cross bill filed by the company on May 6, 1890, after the execution of the deed of November, 1889, the company again refers to its lien. The recognition in these pleadings of the continued existence of the lien of the mortgage is wholly inconsistent with the claim that the company had ceased to be mortgagee, and had become the absolute owner, of the property.

It is assigned as a cross error by Burton that the decree below is erroneous in requiring him to pay certain moneys advanced by the company after January 14, 1884, for expenses and counsel fees in setting aside tax deeds upon the premises in question. When the property was conveyed to the company, in January, 1884, it thereafter held the legal title in trust for Burton, subject to his right to redeem it upon paying the mortgage debt and interest, and such legitimate disbursements by the company as were necessary to protect the title. One of the tax deeds was outstanding before the mortgage was made, and although the others were obtained thereafter it does not appear that the mortgagee was in possession of the property. As a general rule the

mortgagee not in possession is under no obligation to pay the taxes upon the mortgaged premises. 1 Jones Mortg. (4th Ed.), § 713. The decree does not allow a counsel fee for the foreclosure of the mortgage. The cases which hold that a counsel fee cannot be recovered in a decree of foreclosure unless there is a stipulation in the mortgage allowing it have no application here. Here the mortgagee, being clothed with the legal title by the mortgagor, succeeds in setting aside tax titles for the benefit of the mortgagor, as well as for the benefit of the mortgagee. When the legal title shall be restored to the mortgagor, upon his payment of the mortgage debt, it will be restored free of tax incumbrances which have been removed by the mortgagee. It has been held that a court of equity will allow a mortgagee counsel fees incurred in defending his title, without any express contract. 2 Jones Mortg. (4th Ed.), § 1606. When the mortgagee pays taxes to preserve his security he is entitled to recover the amount so paid. *Id.*, § 1135; Wright *v.* Langley, 36 Ill. 381. Upon a bill to redeem, a mortgagee is entitled to credit for reasonable counsel fees paid in collecting rents and profits. 2 Jones Mortg., § 1138. The point now under consideration is not alluded to by counsel for the company, and merely referred to, without discussion, by counsel for Burton. But we see nothing inequitable in allowing these advances, which are not unreasonable in amount.

There is a controversy in the case between Hansbrough and the Louisville Banking Company. Hansbrough's claim is that he was the equitable owner of one-half of the 40 acres, by reason of his joint purchase thereof with Burton; that Burton held the legal title to one-half in trust for Hansbrough; that Harris, the president of the banking company, had notice of Hansbrough's interest when he took the assignment of the mortgage to the company, on August 8, 1878; that by reason of such notice to its president the company cannot enforce its mortgage against the one-half interest owned by Hansbrough, but can only enforce it against the one-half interest owned by Burton. Hansbrough became a party to this proceeding for the first time on July 19, 1890. On that day he filed an intervening petition, and asked to be allowed to come in as a defendant, and answer. The prayer of his petition was granted. He then answered the original bill, and also filed a bill of interpleader setting up his claims as above stated. The proof shows that a written contract was executed between Burton and Hansbrough on March 2, 1871, in which it was agreed that "they are jointly and equally interested in the above-described 40 acres of land to the extent of one-half each, while

the title is in said Burton." This agreement was never recorded. Burton, however, admits the ownership of one-half of the land by Hansbrough, and, as against Burton, Hansbrough is entitled to be regarded as said owner. But we think that the court below decided correctly in holding that his claim cannot be sustained, as against the mortgage of the bank. When the banking company took an assignment of the mortgage it had no notice of any interest in Hansbrough. It is conceded that the records furnished no notice of such interest. It is contended, however, that the bank had actual notice. Burton says that in May, 1873, he went to China, and was gone several months; that before leaving Kentucky, to take this trip, he left certain of his papers and business matters in the hands of Harris, as his friend; that he then told Harris of the interest Hansbrough had in the 40 acres. Harris denies that Burton gave him any such information, but says that if Burton did tell him anything about it, it must have been in some casual conversation, and that he had forgotten all about it when he acted for the bank, more than five years afterwards, in the matter of the White mortgage. When he took the assignment of the mortgage, on August 8, 1878, Harris was acting as the agent of the banking company. If he was told in May, 1873, of Hansbrough's interest, he received such information while acting as the friend or agent of Burton. He did not get the notice, if he was notified at all, while he was acting for the bank, but while he was acting for an individual. The knowledge of the agent must be acquired during his agency, and in the course of the same transaction from which the principal's rights and liabilities arise, in order to affect the principal with notice, unless it is clear from the evidence that the information obtained by the agent in a former transaction is so precise and definite that it is or must be present to his mind and memory will engaged in the second transaction. Snyder *v.* Partridge (Ill. Sup.), 29 N. E. Rep. 851. It cannot be said that a remark made to Harris in a casual conversation in 1883 was present to his mind five years afterwards, when he was engaged in taking security for a debt due to the bank of which he was president. Moreover, there is no evidence that White, the original mortgagee in the mortgage made by Burton, had any notice whatever of Hansbrough's interest in the mortgaged premises. If White was a bona fide owner of the mortgage, the bank, as his assignee, would take good title, even if its president had notice. It is well settled that a purchaser with notice may get a good title from a bona fide purchaser without notice of prior equities. Peck *v.* Arehart, 95 Ill. 113. But, in addition to the foregoing considerations,

Hansbrough abandoned the land, neglected for years to assert any interest in it, and suffered Burton to be held out to third parties as owner. He conveyed the title to Burton in January, 1872. In May, 1873, he executed a lease of the land to a tenant of Burton, and himself signed the lease as agent of Burton, and suffered Burton to hold the possession for years thereafter. He delivered up the written contract of March 2, 1871, to Burton, in whose possession it remained until the summer of 1890. Hansbrough went into bankruptcy in April, 1878, and did not schedule any interest in this land as a part of his assets. He admits in his testimony that he had forgotten all about his interest for 17 years, from 1873 to 1890, and only asserted it in the latter year because the contract of March 2, 1871, was then discovered among Burton's papers. During these years he had been a witness in this case, and knew of the mortgage of the banking company, and recognized its right to enforce a lien against the 40 acres, and aided its attorneys in asserting those rights. Under all these circumstances we think that Hansbrough is estopped from denying that the company is entitled to enforce its mortgage against his interest, as well as against that of Burton.

As to the tax deeds. After this cause was reversed and remanded, in 1888, it was reinstated in the court below in March, 1889. Thereafter, by supplemental bill filed on May 23, 1889, and amendments thereto filed on November 25, 1890, the complainants made John McCaffrey and John J. Mitchell, holders of tax deeds, and James Price, claiming to be their tenant, parties defendant, and alleged the invalidity of such tax deeds, and asked that the same be set aside as clouds. On May 22, 1889, the Louisville Banking Company also filed an amended cross bill, which was still further amended on May 6, 1890, attacking the tax deeds, and praying for their cancellation. The same allegations as to the invalidity of the tax deeds are made in the bill of interpleader filed by Hansbrough on July 19, 1890, and in a cross bill filed by Burton on October 14, 1890. The tax deeds are three in number, — one dated July 31, 1876, executed to Asahel Gage, who afterwards conveyed to McCaffrey; one dated October 11, 1881, and one dated December 27, 1883, both issued to McCaffrey. On June 22, 1889, McCaffrey conveyed his interest to Mitchell, who now owns the three tax titles. The decree of the court below declared the deeds to be void, and set them aside. It seems to be taken for granted by counsel that the decree was correct so far as it held the deeds dated July 31, 1876, and December 27, 1883, to be void. As counsel for Mitchell do not attack the finding made by the chancellor in

reference to those deeds, we shall assume that no good reason exists for disturbing such finding. The only one of the tax deeds which counsel discuss in their briefs is the deed dated October 11, 1881. It was made in pursuance of a sale which took place on August 25, 1879, for the taxes of 1877 and 1878. The time of redemption expired on August 25, 1881. Section 216 of the revenue act provides that the purchaser at the tax sale, before he can be entitled to a deed of the land purchased by him, shall serve notice on every person in actual possession or occupancy of the land, also on the person in whose name the same was taxed or specially assessed, if, upon diligent inquiry, he or she can be found in the county, also upon the owners of or persons interested in the land, if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale. The section, after specifying what the notice shall contain, then provides as follows: "If no person is in possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, or the owners of, or parties interested in, said land or lot, upon diligent inquiry, cannot be found in the county, then such person, or his assignee, shall publish such notice in some newspaper printed in such county, * * * which notice shall be inserted three times, the first time not more than five months, and the last not less than three months before the time of redemption shall expire." The statute thus requires that the person in whose name the land is taxed shall be personally served with notice. If, upon diligent inquiry, he cannot be found in the county, then the notice must be inserted in a newspaper three times. It is only when he cannot be found upon diligent inquiry, that the three notices are to be inserted. The making of diligent inquiry, and the failure to find, as a result thereof, must precede the publication. When the party in whose name the land is taxed cannot thus be found he is entitled to notice by three publications, — not by one publication, or by two publications. If the notice is first published once or twice, and then the diligent inquiry is made, and the failure to find results therefrom, the law is not complied with. The statute does not contemplate that the purchaser shall first publish his notices and then, afterwards, make diligent inquiry. Inquiry made before the insertion of the first notice might result in finding the person in whose name the land is taxed. He may leave the county between the first insertion and the second or third insertion. If he can be found at the time when the first notice is inserted, he is not notified in the

way required by law, — that is, by personal service, — but in a way not required by law, — that is, by publication. The statute does not permit the holder of the tax certificate to postpone his diligent inquiry until after he has published his notice. The publication, in such case, has no legal foundation to rest upon, because it is not justified or authorized until there has first been diligent inquiry, resulting in a failure to find. The same observations here made as to the person in whose name the land is taxed apply also to the owners or parties interested. The affidavits filed by McCaffrey, the purchaser of the 40 acres at the tax sale on August 25, 1879, stated that G. G. Street was the person in whose name the land was taxed, and that R. K. White was a party interested in the land, and that diligent search and inquiry were not made for them until May 21, 1881; but these affidavits also state, though no certificate of publication is filed with them, that the notice required by section 216 was inserted in the Chicago *Daily Evening Journal* on the 19th, 20th, and 21st days of May, 1881. Thus it appears that no inquiry was made for Street and White until the notice had been inserted twice, if not three times, in a newspaper. The affidavits show that James Price was in the actual possession and occupancy of the land on May 24, 1881, — three days after the last publication of the notice. But whether Price or anybody else was in the possession or occupancy of the land before or at the time of the publication of the notice, or whether the land was vacant and unoccupied at that time, is not shown. The affidavit of Snow states that he served the notice on Price, as being the only party in the occupancy of the land, on May 24th, 1881. The affidavit of Price himself states that he was on that day the agent of McCaffrey, and on that day served a copy of the notice on another party for McCaffrey, and as his agent. It thus appears that the purchaser at the tax sale served notice upon an occupant claimed to be his own agent, and acting in his own interest. The statute, by requiring notice to be served upon every person in actual possession or occupancy of the land, never contemplated that the purchaser at the tax sale should himself create an occupancy, and then hand a notice to the occupant of his own creation. Such service is not a compliance with the law. The possession or occupancy specified in the statute is one which is held adversely to the holder of the tax certificate. We think that the decree of October 11, 1881, was probably held to be void because the affidavits filed with the county clerk for the purpose of obtaining it do not show that the publication of the notice was preceded by the preliminary conditions required by the statute; that is to say, it does not appear that before publication was made no per-

son was in possession or occupancy of the land, or that there had been diligent inquiry for the persons above specified, and a failure to find them. Gage *v.* Bailey, 100 Ill. 530.

Counsel for the appellant Mitchell rely upon the fourth section of the limitation act, which provides that "actions brought for the recovery of any lands * * * of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, * * * from any public officer or other person authorized by the laws of this State to sell such land for the nonpayment of taxes, * * * shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire such title after taking possession the limitation shall begin to run from the time of acquiring title." Mitchell claims that McCaffrey was in possession of the land by the actual residence of his tenants thereon for seven successive years, having such a title as is called for by section 4, under said tax deed of October 11, 1881. The period of seven years is alleged to have begun on Febuary 10, 1882, when McCaffrey executed a lease to the party then in possession, and to have ended before May 22, 1889, when the first amended cross bill, making the holders of the tax deeds parties, was filed herein. Any deed which purports on its face to convey title may be used as color of title under section 6 of the limitation act, which provides for possession and payment of taxes for seven years, and under section 7 of the same act, which provides for payment of taxes for seven years, while the land is vacant and unoccupied. 2 Starr & C. Ann St., pp. 1538–1548, c. 83. A tax deed may be good color of title under those sections even though the judgment and precept upon which it is based are absolutely void. But it requires something more than mere color of title to constitute the bar contemplated by section 4. *Id.*, p. 1538. The latter section requires a *prima facie* title. For instance, it was held before the adoption of section 224 of the present revenue act (2 Starr & C. Ann St., p. 2101) that a tax deed, without the judgment and precept upon which it is based, is not a *prima facie* title, such as is required by the act of 1835, of which said section 4 was a part. Elston *v.* Kennicott, 46 Ill. 187. By the terms of section 4 the officer must be "authorized" to sell the land for the nonpayment of taxes. Unless the judgment and precept are produced, no authority to sell is shown. It cannot be said that the language of the section refers to any deed which a public officer may make without pretense of authority. Elston *v.* Kennicott, *supra*. On the contrary, the deed is one which is made in pursuance of the authority required by law. The right

of the owner of land which has been sold for taxes to redeem it within two years from the sale is a constitutional right; and the right of the owner to reasonable notice, by publication or otherwise, of the fact of sale, and when the time of redemption expires, is also a constitutional right. The constitution furthermore directs that occupants shall in all cases be served with personal notice before time of redemption expires. Const. 1870, § 5, art. 9. Hence it is necessary, in order to establish a *prima facie* title under section 4, to show notice, by personal service or by publication, to the owner, before a tax deed to his land can be lawfully executed by a public officer. Such deed is made without authority unless the notice prescribed by the statute is first given. Accordingly the legislature has provided in section 217 of the revenue act, that before a purchaser at a tax sale, or his assignee, shall be entitled to a deed, he must, by himself or his agent, make an affidavit of his compliance with the conditions of said section 216, above quoted, "stating particularly the facts relied on as such compliance;" that this affidavit shall be delivered to the person authorized by law to execute the tax deed, and shall be filed by him with the officer having custody of the record of the lands sold for taxes," etc., "and entries of redemption," etc.; that the affidavit is to be entered by such officer, "on the records of his office, and carefully preserved among the files of his office," etc. The affidavit required by section 217 must be produced in order to show the *prima facie* title demanded by such section 4. As the title called for by that section must be "a connected title, in law or equity, deducible of record," and as the affidavit, showing compliance with the requirements of the statute as to giving notice to the owner is made a part of the record, the affidavit is a necessary part of the *prima facie* title. In the present case, however, the affidavits do not show a compliance with section 216. They do not show that such notice by publication as section 216 prescribes was given, for the reasons already stated. It follows that the appellant Mitchell has not exhibited such a *prima facie* title as justifies him in relying upon the bar prescribed by said section 4. Hughes *v.* Carne, 135 Ill. 519; 26 N. E. Rep. 517.

Furthermore, we are of the opinion, from a careful examination of the evidence, that McCaffrey obtained the possession which he pleads as an actual residence by either forcing or persuading a party who was holding possession under Burton to abandon Burton, or those holding under him, and to attorn to McCaffrey. The actual residence specified in section 4 is not an unlawfully acquired possession. It is conceded that the evidence does not show possession and

payment of taxes by McCaffrey for seven years upon the whole tract of 40 acres. It is contended, however, that McCaffrey acquired title to the N. E. 10 acres of the 40 acres by possession and payment of taxes for seven successive years under the tax deed of October 11, 1881, as color of title. This contention, however, is not supported by the facts. The first payment of taxes made by McCaffrey under his tax deed was on August 5, 1882, and this suit was begun against him on May 22, 1889, as above stated. Seven years did not intervene between August 5, 1882, and May 22, 1889. In order to create a bar under the first section of the act of 1839, or section 6 of the present limitation law, seven years must elapse between the date of the first payment, when the statute begins to run, and the commencement of the suit. McConnel *v.* Conepel, 46 Ill. 519; Iberg *v.* Webb, 96 Ill. 415; Holbrook *v.* Debo, 99 Ill. 372.

The appellant Mitchell further claims that the Louisville Banking Company is precluded from the right to file a bill to remove the tax deed of October 11, 1881, as a cloud upon its title, upon the ground that Gardner's assignee in bankruptcy did not file the bill within two years from the time when the cause of action accrued in his favor, and consequently that any suit between him and McCaffrey, or Mitchell, claiming an adverse interest touching this property, was barred, under section 5057 of the Revised Statutes of the United States, and that the banking company as grantee of said assignee in bankruptcy in the deed dated January 14, 1884, was also barred by said section, under the doctrine of Gage *v.* Du Puy, 127 Ill. 216; 19 N. E. Rep. 878, and other cases therein referred to. This point would be well taken if the banking company had no other title, when it filed its bill to remove the tax deed, except that derived from the deed made by Stucky, assignee, in 1884. But the bank held a mortgage against Burton, and we have recently held that a mortgagee may file a bill to set aside a tax deed as a cloud. Miller *v.* Cook, 135 Ill. 190; 25 N. E. Rep. 757. Whether a mortgagee in a mortgage which is not executed under seal can file such a bill, or not, is a question which we do not deem it necessary to pass upon in this case, because, when the company filed its amended cross bill, in May, 1889, it held the legal title by reason of the execution of the deed of 1884 by Burton, the mortgagor; he having united with Stucky in making that deed. The company was mortgagee, not only by reason of the original mortgage, but by reason of the conveyance to it by Burton. A mortgagee holding under a deed which, though absolute in form, was intended to be only a mortgage security, can certainly file a bill to set aside the tax deed. Nor do we

deem it necessary to consider whether or not the decree of the court below was correct in establishing a lien upon the portion of the land apportioned to the complainants, Perry and Henderson, for the payment of one-half the amount due to Mitchell for purchase money paid at the tax sales, and for subsequent taxes, together with interest. As the decree below must be reversed, and the cause remanded, the court below will change its decree so as to require one-fourth of said amount, with interest, to be paid by said complainants as a condition precedent to the setting aside of the tax deeds as against the one-fourth interest. We are of the opinion that the decree was correct not only in holding said tax deeds to be void, but also in disallowing the defenses set up by said Mitchell, as the same have been herein referred to. The decree of the superior court is reversed, and the cause is remanded to that court, with directions that it change and modify its decree so far as it is herein held to be erroneous, and that it enter a decree in accordance with the views expressed in this opinion. It is ordered that the costs of this court be paid, two-eighths by the appellees Perry and Henderson, three-eighths by the appellant the Louisville Banking Company, one-eighth by the appellant Burton, one-eighth by the appellant Hansbrough, and one-eighth by the appellee Mitchell. Reversed in part, affirmed in part, and remanded with directions.

CHAPTER IX.

ESTATES UPON CONDITION AND LIMITATION AND CONDITIONAL LIMITATIONS.

Wiswell *v.* Bresnahan, 84 Me. 397; 24 A. 885.
Cowell *v.* Springs, 100 U. S. 55.
Mann *v.* Jackson, 84 Me. 400; 24 A. 886.
Neely *v.* Hoskins, 84 Me. 386; 24 A. 882.
Henderson *v.* Hunter, 59 Pa. St. 335.

Estate Upon Condition Precedent.

Wiswell *v.* Bresnahan, 84 Me. 397; 24 A. 885.

WHITEHOUSE, J. This was an action of debt on a contract to recover the amount due on the defendant's subscription to a "shoe-factory fund," in the city of Ellsworth.

It appears from the evidence reported that the defendant signed a subscription by which he promised to pay the amount

of his subscription to the plaintiffs, who were therein named as trustees of the fund, "when there shall have been subscribed an amount sufficient, in the judgment of the trustees, to carry out the purposes of this trust." This paper further states that "the purposes of the trust, and the rights, powers, and authority of said trustees, are as set forth in the following articles which we, the subscribers, severally agree to, and said trustees shall in writing signify their acceptance of the trust according to said articles." Article 2 directs the trustees to expend such sums as they might deem expedient for the purchase of lands and the erection of buildings; and article 5 is as follows: "The balance not expended, as provided in article 2, of the whole sum hereby subscribed and collected, not exceeding twelve thousand dollars, may be given by said trustees to any persons, firms, or corporations who shall take a lease or leases of said property, said gift or gifts to be made on such terms and conditions as shall be determined upon by said trustees."

The plaintiffs never signified in writing their acceptance of the trust according to the articles of this agreement, but after subscriptions aggregating some three hundred dollars, including the defendant's, had been obtained upon it, this paper was withdrawn, and another one circulated in its stead, of substantially the same tenor, with the exception of article 5, which is as follows: "The said trustees may in their discretion at any time convey to any persons, firms or corporations the lot, buildings, or machinery purchased or erected, as provided in article 2, upon such terms as they may decide, and with or without consideration, as they may deem for the best interests of the city of Ellsworth and of these subscribers." The plaintiffs formally signified in writing their acceptance of this trust by an indorsement over their signatures, and thereupon further subscriptions were obtained on this second agreement aggregating nearly $25,000, a sum sufficient, in the judgment of the trustees, to carry out the purposes of the trust.

If the defendant is liable in this action, it is by virtue of the contract which he signed. But it is an elementary principle common to all contracts that there must be a mutual assent of the parties to the same subject-matter in the same sense.

No contract is completed until each party has accepted every proposition of the other without modification or the addition of new matter. There must be a clear accession on both sides to one and the same set of terms. 1 Chit. Cont. 15–21; Metc. Cont. 18; 1 Pars. Cont. 476; Jenness *v.* Iron Co., 53 Me. 20; Railroad Co. *v.* Unity, 62 Me. 153. The result of the authorities is all embraced in the simple principle that only when the wills of the

parties so unite in the same thing as to exactly coincide does the law recognize a contract. Bish. Cont., § 334.

But it appears from a comparison of the two papers that after the defendant's subscription had been obtained on the first one, and before the plaintiffs had signified their acceptance of the trust, a material alteration was made in article 5. The terms of article 5, in the second paper, disclose an essential modification of article 5, in the paper declared on in the writ. The authority conferred upon the trustees respecting the disposition of the funds is widely different. There appear to be two separate and distinct trusts. The trust accepted by the plaintiffs in writing is not the one set forth in the contract signed by the defendant.

The acceptance of the trust by the plaintiffs according to the articles of the agreement must be deemed an essential term of the contract. The defendant might well repose special confidence in the integrity, ability, and discretion of the plaintiffs, and willingly contribute to a fund to be employed at their discretion, when he would decline to subscribe if others were named as trustees. Acceptance by the plaintiffs was therefore a condition precedent to their right to enforce payment of the subscriptions.

But it is insisted in behalf of the plaintiffs that, though they omitted to signify their acceptance in writing on the paper signed by the defendant, they did in fact accept the trust and enter upon the execution of it. Of this, however, there is no satisfactory evidence. They did not signify their acceptance in writing on the first paper, and, after subscriptions to an insignificant amount had been obtained upon it, it was superseded by another and a different one on which is written the plaintiff's form of acceptance of the trust, "according to the articles thereof." The inference from this is irresistible that the plaintiffs decided not to accept the trust set forth in the agreement declared on. The amount which in the judgment of the plaintiffs was sufficient to carry out the purposes of the trust was subscribed on the second paper, and not on the first. The plaintiffs entered upon the discharge of the trust which they accepted, and not of the trust which they did not accept. The facts reported establish no contract by which the defendant is bound. Railroad Co. *v.* Unity, *supra*.

Plaintiffs nonsuit.

Peters, C. J., and Virgin, Libbey, and Foster, JJ., concurred. Emery, J., did not sit.

Estate Upon Condition Subsequent — Restriction Against Sale of Intoxicating Liquors on Premises.

Cowell *v.* Springs Co., 100 U. S. 55.

Mr. Justice Field. In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was $250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed, agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterward opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its

subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone, 159, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable ond inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in Plumb *v.* Tubbs, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. 14 Kan. 61. See, also, Doe *v.* Keeling, 1 Mau. & Sel. 95, and Gray *v.* Blanchard, 8 Pick. (Mass.) 283.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See, also, Austin *v.* Cambridgeport Parish, 21 Pick. (Mass.) 215; Cornelius *v.* Ivins, 2 Dutch. (N. Y.) 276; Ruch *v.* Rock Island, 97 U. S. 693.

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September,

1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or advanced the purchase-money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and to enforce the trust; it did not prevent the legal title from passing by his conveyance. Perry Trusts, § 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado and to hold and convey real property there. By the law of March 2, 1867, then in force, the legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits. 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reason of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this

position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the Territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property, also to construct and operate ditches, wagon roads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the Territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State, succeeding that of the Territory, and the incorporation,

and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purpose of their incorporation, and the title made to rest upon the proof of that necessity. Natoma Water and Mining Co. *v.* Clarkin, 14 Cal. 552.

But there is another, and general answer to this objection.

The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of this condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it. Gill *v.* Fauntloroy, 8 B. Mon. (Ky.) 185; Miller *v.* Shackleford, 4 Dana (Ky.), 287, 288; Fitch *v.* Baldwin, 17 Johns. (N. Y.) 161.

Judgment affirmed.

Condition in Restraint of Marriage, Valid where it Creates an Estate upon Limitation.

Mann *v.* Jackson, 84 Me. 400; 24 A. 886.

WHITEHOUSE, J. This is a bill in equity brought for the purpose of obtaining a judicial construction of the following will:—

"(1) I will that the money which may come from the policy of insurance which I hold on my own life be appropriated to the payment and discharge of any and all mortgages then existing on my homestead house and lot on Cedar street, in said Bangor, so that said homestead may be free from all incumbrances, and any balance to be applied to pay any taxes then due or unpaid, on said homestead, and any balance to go with my other estate.

"(2) My said homestead house and lot aforesaid I give and devise to my unmarried daughter, Helen S. Mann, for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use, and enjoyment of said homestead, but subject to the duty of

keeping it in good repair at her expense, and paying all taxes and keeping the property well insured. If all parties interested see fit to sell the property, they may do so, in which case Helen is to receive the net income from the proceeds of sale, the same to be well invested for that purpose; and, if the buildings are burned in whole or part, the insurance money shall be applied to repair or rebuild, unless all agree to a different appropriation of the money, viz., all parties interested.

"(3) All other estate, real and personal, of all kinds, which I may own or possess at death, including the remainder of my homestead house and lot aforesaid, my farm on the 'Odin Road,' so-called, and all other property, I give in equal shares to my three children, William E. Mann, Mrs. Augusta S. Harden, and Helen S. Mann, to have and to hold the same to them, and their heirs and assigns, forever."

After the death of the testator, Helen S. Mann married, and is the defendant in this suit.

The language of the second item of the will is specially brought in question. The plaintiff says that the defendant's "life estate" in the homestead was terminated by her marriage, while the defendant contends that the clause limiting her exclusive title by her marriage is void, as being a condition in restraint of marriage, and that she is entitled to the sole use and occupation of the homestead during her natural life.

It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to cause undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether precedent of subsequent, whether there was any gift or not. But the courts of equity found themselves greatly embarrassed between their anxiety on the one hand to follow the ecclesiastical courts and their desire on the other to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been ingrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions

subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that "the more we read, unless we are very careful to distinguish, the more we shall be confounded." The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void would seem to be involved in great uncertainty and confusion both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law. "The true rule upon the subject is," says Mr. Redfield, "that one who has an interest in the future marriage and settlement of a person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the married relation, and so be in some respect in restraint of marriage. * * * Where there are hundreds of conflicting cases upon a point, and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?" 2 Redf. Wills, *290, § 20, and note. See also, *Id.* 297, and 2 Jarm. Wills, 569. Beyond the general proposition first stated, the cases seem finally to resolve themselves for the most part into the mere judgment of the court upon the circumstances of each particular case. 2 Redf. Wills, *297, § 31, 2 Pom. Eq. Jur. 933; Coppage *v.* Alexander's Heirs, 2 B. Mon. 313, and note to same, 38 Amer. Dec. 153.

But the rule was so far modified and relaxed that conditions annexed to devises and legacies restraining widows from marrying have almost uniformly been pronounced valid. 2 Pom. Eq. Jur., *supra*. From the numerous decisions upon the subject in the United States, the conclusion is fairly to be drawn that such conditions will be upheld in the case of widows, whether there is a gift over or not. 2 Jarm. Wills, p. 564, note 29; 2 Redf. Wills, 296; Schouler Wills, 603. See, also, recent cases of Knight *v.* Mahoney, 152 Mass. 523; 25 N. E. Rep. 971, and Nash *v.* Simpson, 78 Me. 142; 3 Atl. Rep. 53.

In 2 Redf. Wills, 296, the author says: "We apprehend there is no substantial reason either in law or morals, why a man should be allowed to annex an unreasonable condition in restraint of marriage, one merely *in terrorem*, in case of a wife, more than of a child or any other person, in regard to whose

settlement in life he may fairly be allowed to take an interest; but the cases certainly, many of them, maintain such distinction."

It is unnecessary, however, to enter upon an elaborate discussion of the subject, the existence of the rule as recognized in Randall *v.* Marble, 69 Me. 310, is not here questioned. In that case the rule was applied to a "crude and ill-defined" proviso in a deed of real estate. We have no occasion to question the soundness of that decision. It was the judgment of the court upon a particular set of words in that deed. It is not an authority to control the judgment of the court respecting the construction of an entirely different set of words in a testamentary gift of real estate.

There is a recognized distinction between conditions in restraint on marriage annexed to testamentary dispositions and restraints on marriage contained in the very terms of the limitation of the estate given.

In Heath *v.* Lewis, 3 De Gex, M. & G. 954 (1853), a testator made a gift of £30 a year to an unmarried woman during the term of her natural life, "if she shall so long remain unmarried." Lord Justice Knight Bruce said: "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that, if such a legatee shall marry the annuity would thereupon cease. 'During the term of her natural life, if she so long remain unmarried,' is the technical and proper language of limitation, as distinguished from a condition."

Lord Justice TURNER said: "It may either be a gift for life defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life, if she be so long unmarried; and the question is therefore purely one of intention, in which of the two senses the words were used."

Jones *v.* Jones, 1 Q. B. Div. 279 (1876), is an important authority. It related to a devise of real estate, the testator's language being as follows: "Provided said Mary remains in her present state of single woman; otherwise, if she binds herself in wedlock she is liable to lose her share of the said property immediately, and her share to be possessed by the other parties mentioned." BLACKBURN, J., said: "A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great

many nice distinctions were established as to whether the bequest amounted to a condition or only a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions. But this is a devise of land which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land.

"There is I admit strong authority, that, when the object of the will is to restrain marriage and promote celibacy, the courts will hold such a condition to be contrary to public policy, and void. But here there appears to be no intention to promote celibacy. Now here, I think, when one sees the scope of the testator's dispositions, it comes to this: 'I have left to three women enough to live upon, and if one of them dies I bring in Jemima and Mary. But if Mary (I suppose as the youngest she was most likely to change her state), happens to marry, her husband must maintain her, and her share shall pass to the rest.' Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that the limitation to Mary until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition it is bad."

Lush, J., said: "We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal; and as I read the words, the testator only meant to provide for her while she was unmarried. There is nothing in these words which compels us to think it was the testator's object that this niece should never marry at all; he probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife." See, also, Hotz's Estate, 38 Pr. St. 422; Cornell *v.* Lovett's Ex'rs, 35 Pa. St. 100; Graydon *v.* Graydon, 23 N. J. Eq. 230; Courter *v.* Stagg, 27 N. J. Eq. 305.

It is the enlightened policy of courts of equity, when not restrained by compulsory rules, to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words.

In the case before us the testator makes careful provision in the first item of the will for the appropriation of so much of the proceeds of his life insurance as might be necessary to discharge all mortgages on the homestead. In the second item he devises the homestead to his unmarried daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use and

enjoyment of said homestead." In case all parties interested agree to a sale of the property, this daughter is to receive the net income of the proceeds, "the same to be well invested for that purpose;" and, in the event of the destruction of the buildings by fire, the insurance money shall be applied in rebuilding them. In the third item he gives the residue, including the remainder of his homestead, to his three children in equal shares.

Here, then, is the case of a parent who has a recognized right, and was under a moral obligation to interest himself in the settlement of his daughter. To the ordinary mind, untrammeled by the "mediævalism of the law," there is nothing in the will indicating any other thought or feeling than an affectionate regard for the welfare and happiness of a beloved daughter, and an anxious desire to provide for her a permanent and comfortable home. The modern court, free from the incubus of arbitrary legal dogmas, must fail to discover in the language of this will any suggestion of a purpose on the part of the father to impose a condition *in terrorem* in restraint of his daughter's marriage. It discloses no other disposition than a praiseworthy desire to secure to the daughter the continued occupation and enjoyment of the old homestead until, by reason of her marriage, she should cease to need it; then she was to share equally with her sister and brother in the entire estate. It is manifest from the whole tenor of the will that nothing was more remote from the real purpose of the testator than the idea of discouraging the marriage of this daughter. The intention was not to promote celibacy, but simply to furnish support until other means should be provided. Because of the inadvertent use by the scrivener of the word "unless" this court is not compelled to impose upon this instrument an intention which it is manifest from the context the testator never had. There is no such inflexible rule; the rights of the parties are not to be determined by an application of such a Procrustean method. The provision is in no respect *contro bonos mores*. It is not violative of any principle of sound policy; and, if it is here necessary and proper to recognize and maintain the distinction between a limitation and a condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition.

The defendant's exclusive right to the possession and enjoyment of the entire homestead ceased upon her marriage.

Decree accordingly.

Peters, C. J., and Virgin, Libbey, Emery, and Foster, JJ., concurred.

Estate Upon Condition Distinguished from a Trust.

Neely *v.* Hoskins, 84 Me. 386; 24 A. 882.

PETERS, C. J. This is a real action to recover a lot of land, with a church edifice thereon situated in Old Town, the demandant claiming under a deed to himself from Ira Wadleigh, dated November 21, 1885, which, omitting formal parts and description of premises, is as follows: —

"Know all men by these presents, that I, Ira Wadleigh, now of Sacramento, in the State of California, formerly of Old Town, Maine, by Joseph B. Moor, of Bangor, may lawful attorney duly and legally authorized to make and execute and deliver these presents, in consideration of five hundred dollars to me in hand paid by George Burgess, of Gardner, bishop of the Prottestant Episcopal Church for the diocese of Maine, the receipt whereof is hereby acknowledged, do hereby give, grant, sell, and convey unto the said George Burgress, bishop as aforesaid, upon the condition that it shall be forever for the use of the Protestant Episcopal Church at Old Town, and to his successors in said office forever, a certain lot of land on the east side of Marsh's island, in Old Town, county of Penobscot, Maine, and all the buildings, fixtures, and property thereon at the date hereof, known as 'St. James' Church and Lot,' to wit: * * * Reserving and excepting from said conveyance to said Wadleigh and to J. H. Hillard, their heirs and assigns, the occupation of three pews numbered eleven and thirteen, and to said Hillard the pew heretofore conveyed to him by deed from said Wadleigh or the parish of St. James' Church. * * *

"To have and to hold the aforegranted premises, with all the privileges and appurtenances thereof, to the said George Burgess, and his successors in said office, forever. And I do covenant with said grantee and his successors that said premises are free of all incumbrances created by me, and that I and my heirs shall and will warrant and defend the same to said grantee and his successors forever against the lawful claims and demands of all persons claiming by, through, or under me.

"In witness whereof I, the said Wadleigh, by Joseph B. Moor, my attorney, authorized as aforesaid, for the consideration aforesaid, have hereunto set my hand and seal this ——— day of ———, in the year of our Lord one thousand eight hundred and sixty-five."

The defendants are grantees and heirs of Ira Wadleigh, now deceased, and claim that the foregoing is a deed upon condition subsequent, that the condition has been broken, and that the estate has reverted to themselves as such heirs.

Upon the question of forfeiture and reverter, and of estoppel and waiver, much is adduced on both sides, and many arguments urged. The defendant's counsel, however, deny that the conveyance is upon condition, contending that it is to be construed as a deed of trust merely. If this position be tenable, and we feel constrained to so hold, all the other questions that have appeared in the case become superseded thereby.

It is not expressed in the deed that the estate shall be revertible for any cause, but it is contended that the idea is implied. The term "condition" does not necessarily import it. "Condition" may mean "trust," and "trust" mean "condition," oftentimes. The construction must depend upon the context and any admissible evidence outside of the deed.

An examination of certain prior instruments of conveyance to Wadleigh from the parish, named in his deed to the bishop, will very much assist in showing the intention of the parties as contained in the deed in question.

The parish, having a full title to the property, excepting as incumbered by mortgage, conveyed, on July 8, 1852, to Wadleigh certain pews in the house by a deed of the following form: —

"Know all men by these presents, that we, the undersigned, wardens of St. James' Church, in Old Town, being duly authorized in the premises, in consideration of large claims against the parish given up to us in said capacity by Ira Wadleigh, Esq., which we do hereby acknowledge, have bargained, sold, and conveyed, and by these presents do hereby bargain, sell, and convey, unto said Wadleigh and his heirs and assigns forever, the right to occupy, use, and enjoy forty-five pews in St. James' Church, in Old Town aforesaid, and the privileges to said pews belonging, said pews being numbered as below.

"This conveyance is on the condition that neither the said Wadleigh, nor his heirs or assigns, shall change the worship in said church to any other denomination than that of the Protestant Episcopal Church, or in any manner consent that it may be changed, and it shall be void, and the property revert, if so changed, either wholly or in part.

"To have and to hold the rights aforesaid to him, said Wadleigh, and his heirs and assigns, forever, upon the condition aforesaid. And we do hereby in our said capacity covenant with said Wadleigh that said pews are free of all incumbrances, and that we in our said capacity will, and the wardens of said church shall, warrant and defend said pews on the condition aforesaid, to him, said Wadleigh, and his heirs and assigns, forever, against the lawful claims and demands of all persons.

"In testimony whereof we, the wardens of the church aforesaid, have set their hands and affixed their seals this eighth day of July, A. D. 1852, in our capacity of wardens.

"The pews hereby conveyed are numbered as follows: * * *

"Signed, sealed and delivered in the presence of us.

"D. C. WESTON. IRA WADLEIGH. [L. S.]

"CONY FOSTER. [L. S.]"

On the same day the parish made to him another deed (omitting a part of the description of the premises), as follows: —

"Know all men by these presents, that we, Ira Wadleigh and Cony Foster, wardens of the parish of St. James' Church, in Old Town, Maine, being duly authorized in the premises, in consideration that Ira Wadleigh, Esq., of said Old Town, has given to the said parish a receipt in full of all demands, and has also given to said parish a full release and discharge of a mortgage against said parish, recently assigned to said Wadleigh by Samuel Blake, Esq., do hereby give, remise, release, sell, and forever quitclaim unto the said Wadleigh, his heirs and assigns, a certain parcel of land, with the church and one other building thereon, lying on the east side of Marsh Island, in said Old Town, viz.: Lot numbered fourteen, according to Herrick's plan of part of lot numbered fifteen, Holland's survey and plan, and bounded as follows: * * * Being the same lot conveyed to the parish by Turner Cowing and James Green, November 20, 1840.

"To have and to hold the aforementioned premises, with all the privileges and appurtenances to the same belonging, to the said Wadleigh, and to his heirs and assigns, forever, subject to the following reservations and conditions: —

"The said parish reserves to itself forever the ownership of all the pews in said church, together with free, sole, unconditional, uninterrupted, and exclusive use, occupation and control of said church, with its appurtenances, except the basement hall, forever. This reservation includes the furnace and cellar in the rear of said hall, with the right of access at all times to and from said cellar through said hall.

"The parish reserves the right to repair and alter said church and to rebuild it, if destroyed from any cause, on the old foundations, free of all charges of ground rent forever. It is understood, however, that the insurable interest in said church and its appurtenances is to be and remain in the said Wadleigh, his heirs, representatives, and assigns, the insurance thereof to be made in his and their names, and for his and their use and benefit, the said parish divesting itself

of all insurable interest; and the foregoing reservations are made subject to this qualification: —

"The insurable interest thus made available to the said Wadleigh is intended as a compensation in part for the great expenditures and sacrifices which he has made in behalf of said parish in the erection of said church. The following are the conditions on which this deed is given: —

"Condition first is that neither the said Wadleigh, nor his heirs nor assigns, shall ever use said basement hall, nor allow nor suffer it to be used on Sundays; so that the church services may never be disturbed on this holy day by any movements or noise underneath. Nor shall said hall be used on any other day of the week for any purpose that may be an annoyance to the parish, or disturb the week day services in said church.

"Condition second is that so much of the lot hereby conveyed as lies east of a line twenty feet distant from the west end of said church, and parallel thereto, shall always be left with said church for its accommodation.

"In witness whereof we, the said Wadleigh and Foster, have hereunto set our hands and seals this eighth day of July, A. D. eighteen hundred and fifty-two, in their capacity of wardens aforesaid. "Ira Wadleigh. [L. S.]

"Cony Foster. [L. S.]

"Signed, sealed, and delivered in the presence of

"Nathan Weston,

"Danl. C. Weston."

These deeds, as explained by other facts, show quite conclusively that the deed to the bishop was intended to be a conveyance in trust, and not upon any condition that could work a forfeiture to the grantor. The only condition that was created lies between the bishop and the parish.

One very influential fact, tending to show the correctness of this conclusion, is that the conveyance was not a gift or donation from Wadleigh, but a purchase from him by the bishop, who collected the money for the purpose from sources outside of the parish. Then there is the further fact that Wadleigh conveyed not much more than a technical title to the property, already loaded with restraints and conditions in favor of the parish, giving only a quitclaim deed or what amounts to such. He had not the estate to convey. At most he had but a limited right of possession and use in a basement hall in the building, and a right of occupation in a considersble number of pews. It would certainly be unusual to annex such a condition as is pretended upon a purchase of such an interest in such a property.

It will be seen from the deed to Wadleigh what a burden was imposed upon his estate by conditions and restrictions. "The parish reserves to itself forever the ownership to all the pews in the church, together with the free, sole, unconditional, uninterrupted, and exclusive use, occupation and control of the church and its appurtenances, except the basement hall." It also reserves some right of use of the hall, and restricts the grantee in his use of it. And it retains the perpetual right of repairing the church, and to rebuild the same without payment of rent, in case of its destruction by fire.

Besides, the testimony shows that the deed of the parish to Wadleigh includes valuable land adjoining the church, not included in the deed from him to the bishop. The latter deed excludes enough land for two good house lots, and does not even include the territory upon which the rectory belonging to the church stood at the time.

In view of all the circumstances, the witness Sewall, who would be perhaps more likely than any other person to be informed on the question, testifies that the $500 paid was an adequate consideration for the interest purchased. At all events, that sum was satisfactory to the grantor, who had removed from Old Town, and was then in California. The parish was evidently poor, and the pews neither valuable nor salable. Of course, if the premises were worth no more than that sum to sell, there would be no more value in them to the grantor upon a reverter. The heirs are mistaken in supposing if such be their view that a forfeiture of the interest to them would discharge the conditions imposed upon the property by prior deeds. In the light of these facts, it seems unreasonable to believe that the grantor Wadleigh would have asked for conditions of forfeiture, or that the grantee would have submitted to any.

Furthermore, there is every reason to believe that the grantor never conceived the idea of inserting any condition for his own benefit in the conveyance. The deed was executed in his name and for him by Joseph B. Moor, a son-in-law, under the authority of a general power of attorney to take possession of all his real and personal property in Penobscot County and any property in which he was interested, and sell the same, or any part thereof, for such sums or prices and on such terms as to him should seem meet. The same grantor sells to Charles Wadleigh a balance of the church lot not covered by his deed to the bishop, describing it as "all the land west of the premises heretofore by me conveyed to George Burgess, bishop of the diocese of Maine, in trust for the parish of St. James."

He not only thus describes the conveyance as a trust, but the

bishop does the same thing, who undoubtedly dictated the form of the deed by the following written communication: —

"GARDINER, May 3, 1865.

"MY DEAR SIR: I have written to Mr. Joseph B. Moor, of Bangor, who Mr. Wadleigh authorized, by his power of attorney, to make a deed of his interest in the church at Old Town; and have informed him that I would request you, as Mr. Wadleigh suggested, to prepare the deed, and would have the money, $500, in readiness at the time of its execution.

"The deed, it appears to me, should be made to me, as bishop of the Protestant Episcopal Church in Maine, and to my successors in office, in trust for the parish of St. James' Church, Old Town.

"You will judge best whether it should be a quitclaim deed or more. You will also satisfy yourself, I presume, by examination, that there is no other incumbrance.

"Mr. Wadleigh reserves five pews, and they should be designated. He fixes the boundary at twenty-five feet west of the church. If you will send me the draft of the deed before it is executed, I will send it back with a check for the money.

"Respectfully yours,

"GEORGE BURGESS."

"Hon. G. P. Sewall."

If it be inquired why there were inserted in the deed to the bishop the words, "upon the condition it shall be forever held for the use of the Protestant Episcopal Church in Old Town," the answer is that the bishop was buying the interest for the parish and not for himself. He collected the money paid for the purpose for the parish, and not for himself. Therefore he was to hold the property for the benefit and use of the parish. Had the bishop taken a deed to himself in unqualified terms, the parish would have stood in the same relation towards him as they had before stood with Wadleigh. The object was to extend relief to the parish, and to obtain its freedom from such claim in the hands of Wadleigh or any one else. It was not to have the claim of Wadleigh assigned, but to extinguish it.

Undoubtedly the deed contains a condition for the benefit of the parish, but not for Wadleigh's benefit. It operates between the parish and the bishop, and is not available otherwise. Every trust implies a condition that the trustee will faithfully administer the trust. Equity would enforce this trust at the instance and for the benefit of the parish. But the heirs of Ira Wadleigh could not complain. Sohier *v.* Trinity Church, 109 Mass. 1.

Judgment for defendant.

Walton, Virgin, Emery, Foster, and Haskell, JJ., concurred.

Estate upon Limitation.

Henderson *v.* Hunter, 59 Pa. St. 335.

Agnew, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitations of the use itself.

It is for the erection of "a house or place of worship for the *use* of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the

words "until," "so long," "if," "whilst," and "during," as when land is granted to one *so long* as he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents he shall have made £500. 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120–21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing; for a mere temporary suspension of service there, or a discontinuance of the use without authority, would not, *ipso facto*, determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

According to the constitution and discipline of the Methodist Episcopal Church of the United States, its preachers, denominated deacons and elders, are not called by the societies to which they preach, but are appointed to stations, and to travel in circuit, by the presiding bishop of the annual conference. The power is lodged in him, but from a practical necessity he acts with the advice of his council of presiding elders assembled at the annual conference. The government of the church is clerical and not lay. It has no admixture of the laity, excepting in the quarterly conference of the circuit or station, in which certain lay official members are admitted to seats *ex necessitate rei*. The annual conferences are composed of the deacons and elders in the traveling ministry within the respective conferences, presided over by a bishop or superintendent as originally termed,

assigned to hold the conference by the board of bishops. The general conference consists of delegates, elected by all the annual conferences from among the traveling preachers, presided over by the bishops in turn, and holding its sessions quadrennially.

The annual conferences are divided into districts, composed of the circuits and stations within their respective boundaries. Over each district the bishop, at the annual conference, appoints an elder to preside, who travels his district four times a year, and presides at the quarterly conferences in each circuit or station, composed of the traveling and local preachers, exhorters, stewards, class leaders, trustees, and first male superintendent of Sunday-schools. A station has a single place of stated public service, while a circuit has several. It is to these circuits and stations the traveling preachers are assigned at every annual conference. In his circuit or station the preacher in charge arranges or "plans" the appointments of service during the term of his own appointment. In planning the circuit he *may* take the advice of the stewards, if he choose to ask it; and in arranging the appointments for service it is his duty to give the local preachers within his charge regular and systematic employment on the Sabbath.

No specific directions are found in the discipline as to the arrangement of the appointments, and the whole subject seems in a great measure committed to the sound discretion of the traveling preacher in charge, subject only to the discipline duty of preaching where there is the greatest number of quiet, willing hearers, the most fruit, and where the Spirit most abounds; and subject to the superintending control of the presiding elder, whose duty it is to oversee the spiritual and temporal business of the church; to take charge of all elders and deacons in his district, and to take care that the discipline shall be enforced in his district.

As to the particular building or house in which services shall be statedly held, there is nothing definite in the discipline, and the authority over it seems to be only inferential, arising out of the power of the preacher in charge to arrange the appointments of service, which must include places as well as times of appointment. This vagueness probably flows from the fact that at just this point the boundary of church polity interlocks with the lines of popular support, for money and members must come from the laity. Still church polity reserves a large share of control over church property, as will be seen in the chapter on this subject; with a sorrowful recognition, however, of its dependence, for plainness and economy in the building of churches is enjoined,

lest the necessity of raising money make *rich* men necessary to the church, and if so (says the disciple), "we must be dependent on them, yea, governed by them, and then farewell to Methodist discipline, if not doctrine, too."

In order to preserve control, however, it is made the duty of the quarterly conferences to secure the ground on which churches are to be built according to the deed of settlement, and to admit no charter or deed that does not secure the rights of the preachers of the church in the ministration of its services according to the true meaning of the deed of settlement, the form of which is prescribed.

Thus the effect of this active control of the clerical authorities of the church over preachers, preaching, and church property, is to take from the society at large, or laity, the power of continuing any building as a place of worship according to the rules and discipline of this church, after the ecclesiastical authority has resolved to discontinue the services of its preachers there. The society might choose to worship there of their own head, and call a preacher of their choice who was willing to come without the authority of his church, but in doing so they would cut themselves off from their church connection, and would be worshiping there no longer as members of this church under its rules and discipline; for to worship as members and under the discipline they must accept the traveling preacher sent to them by the bishop. Consequently, the trust in this case ceased when the proper church authorities, acting under and according to the rules and discipline, totally abandoned the building as a place of worship for the members of this church.

The fact of such an abandonment was submitted by the judge and found by the jury. In his charge the learned judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there and the causes thereof. This was all he could do, as the question of fact belonged to the jury.

The reverend gentleman had testified that the church had been abandoned by the conference in March, 1867, and that this action having been taken by his bishop and his council of presiding elders, and the preaching removed to the school-house in the village, any preaching in this building after the conference, was without the sanction or authority of the church.

I must say I have not discovered in the discipline the precise ground of the bishop's authority to do this; yet it may be a proper understanding of his authority as gathered from the entire body of church law, and the rule in the civil court is that the

churches are left to speak for themselves in matters of discipline and doctrine. German Reformed Church *v.* Commonwealth, 3 Barr, 282. But however the fact may be, where the precise power is lodged, certain it is in this case this proof was made, and with it the fact that the abandonment of the building had also the express sanction of the presiding elder and inferentially the sanction of the preacher in charge.

We cannot say, therefore, that the fact of abandonment was submitted without sufficient evidence. The fact being found by the jury, these plaintiffs — at the time of the removal of the building — were no longer trustees of the property by the very terms of the limitation in the deed, and had no ownership or estate to enable them to maintain this action.

This is sufficient for the purposes of this case. But it is also insisted that these trustees were superseded by the election of new trustees by the quarterly conference under a new rule adopted by the general conference of 1864. We shall express no opinion on this point, the interest depending on the form of the deeds made previous to 1864, being too important to be determined upon a meager presentation of the case to us. It is proper, however, to suggest to the church authorities that this is, perhaps, perilous ground to stand upon. The church may provide a new mode for the election of trustees, and make their deeds hereafter conform to this mode. But when it comes to the right to supplant trustees established by contract, or to fill vacancies in a mode differing from the terms of the contract, which are the laws of the trust, a new question arises.

A deed is a contract *inter partes*, the grantor on one side and the trustees on the other, and even the legislature cannot impair the contract. If conflicts should arise between the trustees nominated or provided for in the deed and those appointed by the quarterly conferences, it may be found difficult to overthrow the will of the grantor or first party in the deed expressed in this contract form.

Judgment affirmed.

Note. — For a full explanation of conditional limitations, see cases reported *supra*, and particularly Brattle Sq. Church *v.* Grant, 3 Gray, 142.

CHAPTER X.

MORTGAGES.

Crowell *v.* Keene, 159 Mass. 352; 34 N. E. 405.
King *v.* McCarthy, 50 Minn. 222; 52 N. W. 648.
Macauley *v.* Smith, 132 N. Y. 524; 30 N. E. 997.
Lanahan *v.* Lawton, 50 N. J. Eq. 276; 23 A. 476.
Cook *v.* Bartholomew, 60 Conn. 24; 22 A. 444.
Stewart *v.* Scott, 54 Ark. 187; 15 S. W. 463.
Townshend *v.* Thompson, 139 N. Y. 152; 34 N. E. 891.
Turner *v.* Littlefield, 142 Ill. 630; 32 N. E. 522.
Magie *v.* Reynolds, 51 N. J. Eq. 113; 26 A. 150.
Equitable Life Ass. Soc. *v.* Bostwick, 100 N. Y. 628.
Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187.
Kennedy *v.* Moore, 91 Iowa, 39; 58 N. W. 1066.
Mulcahy *v.* Fenwick, 161 Mass. 164; 36 N. E. 689.
Watson *v.* Wyman, 161 Mass. 96; 36 N. E. 692.
Lanier *v.* McIntosh, 117 Mo. 508; 23 S. W. 787.
Union Trust Co. *v.* Olmstead, 102 N. Y. 729; 7 N. E. 822.

Deed Absolute on Its Face, When a Mortgage.

Crowell *v.* Keene, 159 Mass. 352; 34 N. E. 405.

Lathrop, J. This is a bill in equity, filed on May 16, 1891, and amended on October 24th of the same year, to have a conveyance executed by Michael Robinson to Samuel Keene on April 14, 1870, of six parcels of land in Wareham, declared a mortgage, on the ground that the conveyance, though absolute in form, was intended by the parties as security for certain advances made and to be made to Robinson by Keene, and was understood by the parties to be a mortgage. The case was heard on its merits by a single justice of this court, who found that the deed set forth in the bill was an absolute deed, and ordered a decree for the defendants. At the request of the plaintiff the judge reported the case for our consideration on the pleadings, and a full report of the evidence. The plaintiff's title to maintain the suit is based upon an agreement made by him on August 21, 1890, with Michael Robinson, by the terms of which Robinson agreed to sell, and the plaintiff to buy, the land contained and referred to in the deed to Keene; "the validity of such deed being in dispute between myself and said Keene, and it being understood that this agreement to convey applies only when and to the extent that said obligation, by agreement, compromise, or otherwise, is decided in my favor; I hereby employing such attorney or attorneys as said Crowell may elect, but at his expense; I hereby giving said Crowell or his said attorney a lien upon my claims against said Keene to secure

such advances as they may make." We need not consider whether this agreement gives the plaintiff any standing in court as against the defendants, nor whether the agreement is not void for champerty and maintenance, as we are of opinion upon a review of the evidence, that the finding of the single justice must be affirmed. The controversy relates to a transaction which took place over twenty years ago. What the parties intended was known to them alone, and there is now no direct evidence of such intention, except the instrument which they executed, and the testimony of the defendant, Samuel Keene, Michael Robinson having died before the bill was filed. Keene testified that there was no agreement whatever in regard to the deed being a mortgage; that there was not a word said to that effect; that Robinson made no claim that the deed was a mortgage until 1879 or 1880, after he had married again. Keene was a stepson of Robinson, his mother being Robinson's wife at the time of the execution of the deed. Keene allowed Robinson to live on the land conveyed in 1870, and testified that the consideration for the conveyance was money which he had previously lent Robinson at different times. He continued to lend him money afterwards, and assist him in various ways.

Keene was evidently the moneyed man of the family. If his testimony is true the plaintiff has no case; and his testimony is confirmed by all of the members of the Robinson family, who testify that they always understood, from what their father said, that the land belonged to Keene.

For some years before his death, Michael Robinson asserted that the deed was invalid because it contained, when delivered, only one parcel of land, and that the other parcels were fraudulently added; and this he repeated in September, 1890, in a statement made under Pub. St., c. 169, § 45, to perpetuate his testimony. It is true that this statement also sets forth that the deed was for the purpose of securing advances made and to be made. This statement was put in evidence by the defendants, but, though it appears that the deposition of Michael Robinson was taken under the statute, it was not put in evidence by the plaintiff. It is not now contended that any alteration was made in the deed, and the bill does not proceed upon this theory. The plaintiff's chief reliance is upon certain facts which he contends are proved, and are inconsistent with the theory that the deed was intended as an absolute conveyance, and which are only consistent with his theory. The most important of these we will briefly consider: In July, 1870, Robinson executed a mortgage of one of these parcels conveyed to Keene, without

mentioning the prior conveyance, and with full covenants of warranty. In October, 1878, he executed a mortgage of this parcel, and of another parcel, in the same manner. These acts are relied on as showing acts of dominion on the part of Robinson. But, if they are inconsistent with one theory, they were also inconsistent with the other theory. They repudiate the conveyance entirely. One of these mortgages was recorded prior to the recording of the deed to Keene, and was therefore a valid incumbrance upon the land. The other mortgage was recorded subsequently. Robinson also sold a parcel of land which was a part of the lots embraced in the two mortgages. Keene was present when the title was passed, paid the second mortgage, in whole or in part, and an assignment of this mortgage was made to his wife through a third person, and this mortgage has since been foreclosed. The testimony tends to show acquiescence on his part at this time in Robinson's actions, or at least that he did not see fit to repudiate them. This settlement, however, was 10 years after the date of his deed, and what he then chose to do for the honor of the family has but a remote bearing upon the main question in issue.

The plaintiff further contends that the fact that Robinson was indebted to Keene in 1870 was of itself evidence that the deed was intended as a mortgage. No authority is cited in support of this proposition, and there is no presumption of law either way. As a matter of evidence the fact is of but slight importance.

It appears that the land was, during Robinson's life, taxed to him, and was afterwards taxed to his heirs. The taxes were, however, — at least in part, — paid by Keene. We do not see that the fact that Keene did not notify the assessor of the change of title has any tendency to show that the deed was a mortgage deed, instead of an absolute deed.

The plaintiff further relies on the fact that Robinson cut wood on the land from time to time during the twenty years before the hearing. Keene, however, testified that he gave him that liberty, that it was Robinson's means of support, and that it was done as "a family understanding."

Evidence was introduced of oral admissions made by Keene that he held the title for the benefit of Michael Robinson and his heirs; that he had advanced money from time to time, "and was holding the land for the debts." In May, 1880, Keene wrote to Michael Robinson: "My only purpose is for your benefit, and have acted upon the advice of your friends in Wareham to let it remain as it is for the present, in order to save the farm for you." In February, 1880, also, Keene wrote

to Robinson: "When you are in a position to pay my balance I will talk about a transfer. You say I can't have all. I only want my due, and if you can find any one to let you have money as cheap as I have in the past you are fortunate. It has not been my intention to deprive you [of] liberty of the farm, in the least." This last sentence, Keene testified, related to the fact that he gave Robinson the use of the farm. While these oral and written admissions have a strong tendency to support the plaintiff's theory, they are also consistent with the theory that the deed was intended as an absolute conveyance, and that Keene intended, when he was made whole, to reconvey the land, though under no obligation to do so.

Michael Robinson died November 15, 1890, and after his death and before Keene knew of the agreement made by Robinson with Crowell, he procured releases from Robinson's widow and from his children of any interest they might have in the land. The plaintiff relies upon this fact as being consistent only with his theory of the case. It appears, however, that at this time there was an action pending against Keene in Plymouth County, brought by Michael Robinson, but promoted by the present plaintiff, relating to this property, though precisely what the action was is not disclosed, and that Keene acted under the advice of counsel in obtaining the release, for the purpose of controlling that case.

On the whole evidence, we cannot say that the finding of the single justice, who heard the witnesses, and who was better able to judge of their credulity, from their appearance and manner of testifying, than we can be, was wrong. Chase *v.* Hubbard, 153 Mass. 91; 26 N. E. Rep. 433, and cases cited; Loud *v.* Barnes, 154 Mass. 344; 28 N. E. Rep. 271. Bill dismissed.

Conditional Sale or Mortgage.

King *v.* McCarthy, 50 Minn. 222; 52 N. W. 648.

MITCHELL, J. On the trial of this action the sole issue was whether a conveyance from plaintiff's intestate to the defendant Richard W. Bell (the grantor of his codefendants, Mary McCarthy and Mary Bell) was a mortgage on a conditional sale, and the only question on this appeal is whether the finding of the court that it was the former, and not the latter, was justified by the evidence. No conclusive test of universal application can be suggested to determine whether such transactions are mortgages or conditional sales. Each case must be decided in view of its own peculiar circumstances. The true test is, what

was the intention of the parties? Did they intend security or sale? This is to be gathered from the surrounding facts and the situation of the parties, as well as from the written memorials of the transaction. And while it is undoubtedly true that, in order to convert what appears on the face of the written contract to be a sale into a mortgage the evidence should be clear that the real intention of the parties was to execute a mortgage, yet the inclination of the courts is to construe the contract to be a mortgage rather than a conditional sale, whenever the evidence will reasonably admit of it. We shall not attempt any extended discussion of the evidence. Notwithstanding the testimony of Bell (which was the only direct evidence as to the negotiations between the parties at the time of the conveyance) that he refused to take a mortgage, and that the understanding was that it was a sale conditioned that McCarthy might buy the property back within one year upon paying what he (Bell) should advance to remove the incumbrances, yet an examination of the entire record satisfies us that the real intention and understanding of the parties was that Bell was to advance for McCarthy the money necessary to relieve the property of incumbrances, and take the deed as security; in other words, that Bell was to carry the property for the McCarthys, or, as Bell himself expressed it in one place, he was "to clear up the entire property for them." The subsequent conduct of the parties in the treatment of the property tends strongly to prove that the understanding of both parties was that the property still belonged to the McCarthys, and that Bell merely held the title to secure his advances. It is true that Bell took control of it so far as to collect most of the rents. But these were all needed, as he says, to pay taxes and assessments. It also appears that the McCarthys still continued to occupy part of the property as a residence, and it does not appear that they ever paid, or that Bell ever demanded any rent from them. And finally, in 1887, nearly two years after the alleged year's option to buy the property back had expired, Bell, after consultation with the widow of McCarthy and with her consent, executed a mortgage on the property, on which he realized enough to reimburse him for all he had advanced, and then, without receiving any consideration, quitclaimed the property to McCarthy's widow and daughter, taking back from them a bond, with security, to indemnify him against the mortgage which he had executed on the property, and against any claim of the creditors of the estate of Jeremiah C. McCarthy. He testifies that he did this at the solicitation of his parents, for certain family considerations, his brother having married McCarthy's daughter; but men do not often, for such

reasons, give away property worth $35,000. His conduct can be much more reasonably accounted for upon the theory that it was the understanding that he held the property merely as security for his advances, and, these having been reimbursed out of the proceeds of the mortgage, he had no further claim upon it, and therefore transferred it to McCarthy's family to whom it rightfully belonged. It is true, as counsel claims, that the character of the transaction, whether a mortgage or conditional sale, was fixed at its inception; but the subsequent conduct of the parties in such cases may throw a flood of light upon their original intention and understanding. Another circumstance entitled to weight is the disproportion between the amount Bell was to advance to remove incumbrances and the value of the property. The amount of the incumbrances did not exceed $10,000 while Bell admits that at the time he obtained the deed from McCarthy the property was worth 22,000. It is often laid down in the books that the existence of a debt is the test whether a transaction is a mortgage or a conditional sale, and much stress is laid by defendant's counsel upon the fact that there was no note or bond given by McCarthy as evidence of any debt to Bell, and that there was no covenant or any personal obligation to pay what Bell should advance to clear the property. This, if true, would be a circumstance of no inconsiderable importance, but it is not complete or conclusive evidence that a transaction was a sale, and not a mortgage. This court has twice held that, where the real nature of the transaction is a loan advanced upon the security of real estate conveyed to the party making the loan, it is none the less a mortgage because the advance is made wholly upon the security, and without any personal obligation on the part of the borrower. Fisk *v.* Stewart, 24 Minn. 97; Niggeler *v.* Maurin, 34 Minn. 118; 24 N. W. Rep. 369. See, also, Brown *v.* Dewey, 1 Sandf. Ch. 56. But it is not necessary to go that far in order to sustain the finding in this case, for we are satisfied that the evidence would warrant the conclusion that the relation of debtor and creditor was actually created between McCarthy and Bell, and that there was an implied promise on part of the former to repay the latter as for money paid at his request and for his use. Order affirmed.

Absolute Deed with Separate Defeasance Clause, — no Express Covenant to Pay.

Macauley *v.* Smith, 132 N. Y. 524; 30 N. E. 997.

Opinion by LANDON, J.

The action was to have certain conveyances of real estate by war-

ranty deeds declared to be mortgages, and to have the real estate adjudged to be subject to the lien of a certain judgment recovered by the plaintiff against the grantor in such deeds, and an execution issued thereon. The action in which the judgment was entered was for the recovery of money only, and was commenced in August, 1879, by this plaintiff against Lucilia Tracy by publication of a summons against the defendant therein as a non-resident, and an attachment was at the same time issued against her property, which was in form levied upon the real estate in question. Judgment by default was entered in that action in July, 1883, and an execution issued thereon to the sheriff of the county where the property was situated, which execution has since been held by the sheriff. On and prior to the 6th day of July, 1871, Lucilia Tracy was the owner and in possession of two parcels of real estate on Alexander street, in the city of Rochester, upon one of which parcels there were two mortgages of $5,000 and $2,000 respectively. On the 5th day of July, 1871, she entered into an agreement in writing with the defendants, Robert H. Smith and Calvin Tracy, and one Slocum Howland, since deceased (who is represented in this action by the defendants, William and Emily Howland, as his executors), whereby, in consideration of and for the purpose of securing a loan of $8,240, she agreed to execute and deliver to them a good and sufficient warranty deed of both parcels of land above mentioned, and the agreement proceeds as follows: "And the said Howland, Smith, and Tracy, in consideration of, and before the execution and delivery of, said deed, hereby agree to advance the said sum of $8,240 (in a manner specified) to the said Lucilia Tracy. It is also hereby agreed, by and between the parties herein, that the said deed is to be and is a security for said loan for a term not exceeding one year from the date of said deed, which is to be hereafter executed; and that upon the repayment of said sum of $8,240, with interest, within or at the expiration of said one year, by the said Lucilia Tracy, her heirs, executors, administrators, or assigns, the said Howland, Smith, and Tracy, their and each of their heirs, executors, administrators, or assigns, are to reconvey said premises so conveyed to said Lucilia Tracy, her heirs, executors, administrators, and assigns, free from all incumbrances upon said premises at the time of the conveyance thereof as aforesaid by the said Lucilia Tracy." "And, in case the said sum of $8,230 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed, so as aforesaid to be executed by the said Lucilia Tracy, is to become and be a deed absolute, and the said

Howland, Smith, and Tracy, or their heirs and assigns, are to become and be the owners thereof in fee simple absolute." Accordingly on the following day Miss Tracy executed and delivered to the other parties to the agreement deeds of the two parcels of land, containing the usual covenants of warranty, which were on the same day duly recorded in the clerk's office of Monroe County, in and by one of which deeds the grantees, as part consideration of the conveyance, assumed the payment of the two mortgages above mentioned, but did not covenant to pay them. The loan was not repaid, and in December, 1872, the grantor remained in possession of the premises for about two years after the date of the deeds, and then quit and surrendered possession of the premises to the grantees, who remained in possession thereof, by tenants or otherwise, until the 1st of January, 1875, when they sold and conveyed the same to the defendant, the New York Baptist Union for Ministerial Education, which has ever since been in possession of the premises, claiming title thereto. The debts for which plaintiff obtained judgment against Lucilia Tracy were contracted prior to January 1, 1872. The agreement of July 5, 1871, was never recorded, and the defendant, the Baptist Union, had no notice thereof at the time of its purchase of the property. It is conceded on the part of the plaintiff that her judgment against the grantor in the deeds above mentioned is of no force or effect, for the purposes of this action, unless as a judgment *in rem*, by virtue of a levy of the attachment upon the property in question. Code Civil Proc., § 707.

The agreement which antedated the deeds by one day, and expressed their intent and purpose, should be read in connection with them. Thus read, the deeds are shown to have been given by Lucilia Tracy to Howland, Smith, and Tracy, "for the purpose of securing, and in consideration of said loan of $8,240," made by the grantees to the grantor; and "that the said deed * * * is a security for said loan for a term not exceeding one year from the date of said deed, * * * and that upon the repayment of said sum of $8,240, with interest, within or at the expiration of one year, by the said Lucilia, * * * the said Howland, Smith, and Tracy are to reconvey said premises to said Lucilia; * * * and, in case said sum of $8,240 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed * * * is to become and be a deed absolute, and the said Howland, Smith, and Tracy are to become and be the owners in fee simple absolute." The deeds are thus clearly shown to have been

intended as mortgages. This conclusion is also inferable from the facts. The premises, at the date of the deeds were worth $30,000. The judgments against the premises were, by the terms of the agreement, to be paid from the money loaned, and presumably were either paid or their amount retained by the grantees from the $8,240. The amount of the outstanding mortgages against the premises was $7,000. It is not presumable that Lucilia Tracy intended to sell property worth $30,000 for $15,240. The grantor remained in possession of the premises for about two years after the delivery of the deeds. She was embarrassed and straitened for money. Stress is laid by the defendants upon the fact that the grantor did not expressly covenant to repay the money. The cases are to the effect that this is one of several circumstances to be considered (Horn *v.* Keteltas, 46 N. Y. 605; Morris *v.* Budlong, 78 N. Y. 552; Brown *v.* Dewey, 1 Sandf. Ch. 57); and here it is to be considered in connection with the repeated statement that the money to be advanced by the grantees is a loan, and that "said deed is a security for said loan, for a term of not exceeding one year," and that upon payment the grantees should reconvey to the grantor. It is plain that repayment of the loan was contemplated. Nothing is said of the repayment of purchase money, and there is nothing in the agreement indicating that the money advanced by the grantees was purchase money, except that, in case said sum of $8,240 (previously termed a loan) should not be repaid at the expiration of one year, "then it is understood and agreed that the said deed is to become and be a deed absolute;" thus clearly indicating that at the date of the transaction said sum was not purchase money, and said deed was not a deed absolute, but was to become so, in case of nonpayment of the loan. Clearly, upon the undisputed facts, the deeds were a mortgage to secure the money loaned, and the trial court erred in refusing the plaintiff's request so to find. The agreement that the nonpayment of the loan within the time specified should convert the mortgage into an absolute deed did not have that effect. The agreement to turn a mortgage into an absolute deed, in case of default, is one that finds no favor in equity.

The maxim, "once a mortgage always a mortgage," governs the case. Horn *v.* Keteltas, *supra;* Murray *v.* Walker, 31 N. Y. 400; Carr *v.* Carr, 51 N. Y. 251; Remsen *v.* Hay, 2 Edw. Ch. 535; Clark *v.* Henry, 2 Cow. 324; Morris *v.* Nixon, 1 How. 118; Villa *v.* Rodriguez, 12 Wall. 323; 4 Kent Comm. 143. Since the deeds were a mortgage, the title did not pass to the grantees, but remained in Lucilia Tracy. Barry *v.* Insurance Co., 110 N. Y. 1; 17 N. E. Rep. 405; Thorn *v.* Sutherland, 123

N. Y. 236; 25 N. E. Rep. 362; Shattuck *v.* Bascom, 105 N. Y. 46; 12 N. E. Rep. 283.

The levy under the plaintiff's attachment was therefore upon Mrs. Tracy's land, to which she had the legal title. It was not merely an attempted levy upon her equitable right to obtain title. As against Howland, Smith, and Tracy, the levy was valid, and the judgment and execution which followed the attachment became a specific lien upon the land itself, and the land could be sold upon execution. Howland, Smith, and Tracy conveyed the premises, before the attachment was issued, to the defendant, the New York Baptist Union for Ministerial Education. This defendant, by its answer, admits that $3,000 of the purchase money, with interest from January 1, 1883, remains unpaid, and that $1,550 of the principle of one of the mortgages upon the premises given by Mrs. Tracy also remains unpaid. This defendant, in order to maintain the defense that it is a *bona fide* purchaser without notice of plaintiff's rights, must have paid all the purchase money. Sargent *v.* Apparatus Co., 46 Hun, 19; Harris *v.* Norton, 16 Barb. 264; Jewett *v.* Palmer, 7 Johns. Ch. 65; Jackson *v.* Caldwell, 1 Cow. 622; Boone *v.* Chiles, 10 Pet. 179; Patten *v.* Moore, 32 N. H. 382. In equity it has not completed its purchase, but to the extent of its payments innocently made before notice of plaintiff's claim, is entitled to protection. It may therefore retire from the transaction without actual loss, and without farther impairing the rights of the plaintiff. The action is in aid of plaintiff's execution. Its object is not to reach any equitable assets of Mrs. Tracy, but to strip from her legal title to the premises in question the obstructions created by the deeds by which such title, apparently, but not in fact, passed from her to Howland, Smith, and Tracy, and from them to the Baptist Union; and thus to show that the lien acquired by plaintiff's attachment of the premises, and perfected by her judgment and execution, was valid, and therefore may now be enforced free from the obstructions which seem to defeat it. Such an action is within the equitable jurisdiction of the court. Beck *v.* Burdett, 1 Paige, 305; Heye *v.* Bolles, 33 How. Pr. 266; Rinchey *v.* Stryker, 28 N. Y. 45; Frost *v.* Mott, 34 N. Y. 253. Thurber *v.* Blanck, 50 N. Y. 80, does not hold otherwise, but does hold that the attachment, to be effective, must operate upon legal rights — the precise position of the plaintiff here. The judgment should be reversed, and a new trial granted costs to abide the event. All concur.

Mortgage Debt May Be Antecedent, Contemporaneous, or Prospective — Constructive Notice in the Case of a Mortgage for Future Advances.

Lanahan *v.* Lawton, 50 N. J. Eq. 276; 23 A. 476.

PITNEY, V. C. This is a bill to foreclose. It is founded on a mortgage executed by the defendant, Walter E. Lawton, to the complainants' intestate, John C. Grafflin, to secure $150,000, in three years from its date. It is dated on the 5th of July, 1884, and was recorded on the 18th of March, 1887, nearly three years later. The defendant Lawton does not appear, and a decree *pro confesso* went against him. The other defendants who have answered are judgment creditors of Lawton, under proceedings in attachment begun March 17, 1887, one day before the record of complainant's mortgage, and set up several defenses, which may be classified as follows: *First*, that the mortgage was never delivered by Lawton to Grafflin; *second*, that neither $150,000 nor any other sum was advanced by Grafflin at the date of the mortgage to Lawton; *third*, that, if ever delivered, it was kept off the record until the date of its record for the purpose of enabling Lawton to obtain mercantile credit on the strength of the unincumbered ownership of the property which it covers, and that the indebtedness of the several defendants was incurred as a consequence, in the belief that Lawton was the owner of the premises without incumbrance; *fourth*, that, if given to secure a running account for present and future advances, nothing is due on that account; *fifth*, that the suits which resulted in the several judgments held by the defendant were commenced by foreign attachment, which was levied on the 17th of March, 1887, one day before the complainants' mortgage was recorded, and thus the defendant lost his property; *sixth*, that complainant's testator must be held to have waived any rights he had as a mortgage creditor by himself issuing an attachment on the 19th of March, 1887, and attaching the same premises, and in coming in as a creditor under the attachment of March 17th, and obtaining judgment for the only debt which he has against Lawton.

The facts are that Mr. Grafflin was a wealthy manufacturer, residing and engaged in business at Baltimore, and that Lawton was a dealer in fertilizers, living and doing business in New York. For some time prior to the date of the mortgage in question, Grafflin had been in the habit of making advances of money to Lawton, and also of loaning him commercial paper which he (Grafflin) had taken in the course of business, and

which he loaned to Lawton before its maturity, and which Lawton procured to be discounted for his own use and benefit. On the 30th of June, 1884, six days before the date of the mortgage, Mr. Lawton was indebted to Mr. Grafflin in the sum of $59,689.82 for advances in cash and interest up to that date, and nearly $50,000 for commercial paper before that time loaned to Mr. Lawton. Lawton, in addition to his dealing in fertilizers, had purchased a large tract of land in Bergen County, which he had devoted, or was about to devote, to the purpose of making brick; and on the 11th of July, in the absence of Mr. Grafflin, he went before a commissioner of deeds for New Jersey, residing in New York, and executed the bond and mortgage in question. How it came into the possession of Mr. Grafflin does not appear; but it does appear in the most satisfactory manner, that it did come into his possession shortly afterwards, without being recorded, and was by him placed among his valuable papers and preserved until the 17th of March, 1887, when, upon the receipt by him of a telegram from Lawton's confidential clerk and cashier that Lawton had absconded, he (Grafflin) took the bond and mortgage from the safe, proceeded directly to New York, and the next day (March 18th) caused the mortgage to be recorded in the Bergen County clerk's office. In the mean time, and on the 1st of January, 1885, the balance due from Lawton to Grafflin had increased to about $135,000, and remained, with some fluctuations, at about that amount, until the time the mortgage was recorded. On the 17th of March, 1887, the Commercial National Bank, one of the defendants, issued an attachment out of the Circuit Court of the County of Bergen against Lawton, and the sheriff attached the mortgaged premises. On the 18th of March, Grafflin, as above stated, recorded his mortgage, and on the 19th he caused an attachment against Lawton to be issued out of the same court. Whether, under these two writs, any other property besides these mortgaged premises was attached, does not appear. The object of the independent attachment by Grafflin is manifested by what followed. On the 5th of April, 1887, he filed a bill in this court to set aside a conveyance which had been made by Lawton on the 1st of March, 1887, and recorded on the 5th of March, 1887, to the New York & New Jersey Brick Company, and a mortgage given by the brick company, of the same date and record, to the Metropolitan Trust Company, to secure the sum of $950,000; and such proceedings were had in that suit that on the 9th of June, 1890, this court decreed that the conveyance and mortgage just mentioned were null and void, and should be set aside, and,

further, that the attachment issued at the suit of the Commercial National Bank was a valid lien and incumbrance upon the premises, and that when the premises were sold by the auditor in attachment the sale should be subject to the mortgage made by Lawton to Grafflin. The judgment creditors, defendants in this suit, who defended, were not parties to that bill. Grafflin died in August, 1888, and letters of administration, with the will annexed, were issued to the complainants, and they were substituted complainants in the suit of Grafflin against Lawton, just mentioned, before decree, and after decree in that suit filed this bill. In the attachment suit commenced by the Commercial National Bank, in which Grafflin appeared as a creditor, he obtained judgment for $135,407.63. Lawton has never been heard of since he absconded, which circumstance, together with the death of Grafflin, leaves the case bare of any evidence as to what the understanding was between the parties with regard to this mortgage, or why it was not recorded. Mr. Grafflin's confidential clerk — a Mr. Rogers — was sworn as a witness. He kept the account of the loans made by Grafflin to Lawton; he also had the custody, for part of the period between its date and record, of the mortgage and accompanying bond in question. He has no personal knowledge of how these papers were passed from the hands of Lawton to Grafflin, nor upon what understanding. Mr. Grafflin's brother-in-law, — one Keener, — who was acting for him in some matters about that time, is also dead. Grafflin himself was at the time quite ill.

This state of the evidence leaves the object of the mortgage altogether a matter of inference; but I think that the established facts of the indebtedness from Lawton to Grafflin, at the date of the mortgage, and its continuance and increase, lead fairly and legitimately to the inference that the mortgage was given to secure that indebtedness, and such future indebtedness as might arise, and justify me in finding so as a matter of fact. The absence of Lawton and the death of Grafflin account for the absence of any evidence to show why the mortgage was not placed on record. The proof shows that Mr. Grafflin was quite ill about that time, and he must have relied upon Mr. Lawton to make him secure, and although Mr. Rogers is quite positive that Grafflin himself handed him the bond and mortgage for deposit among his valuable papers some time not very long after their date, it is not difficult to believe that Mr. Grafflin did not observe that the mortgage had not been recorded, but relied — with misplaced confidence, as the result has proven — upon his friend, Lawton, to do everything that was necessary to

make him secure. Be that as it may, there is not the least evidence to show that the instrument was kept off the record intentionally and knowingly, for the purpose of enabling Lawton to obtain commercial credit on the strength of being the owner of unincumbered property. To so presume from the bare fact of non-record would be to presume in favor of fraud, instead of against it. Besides, it is highly improbable that, in so large a transaction, Mr. Grafflin would have taken so great a risk. It is much easier to believe that the non-recording of the instrument escaped his attention. There is evidence that, as to one judgment creditor, defendant Lawton did obtain credit on the strength of being the owner of the land in question, free of incumbrance; but there is not the least particle of evidence that Mr. Grafflin had any knowledge of any such representation or conduct on the part of Lawton, and I do not see how he can be held responsible for it. With regard to the attachment being issued and levied before the mortgage was recorded, that point is *res adjudicata* in this State. The case of Campion *v.* Kille, 14 N. J. Eq. 229; 15 N. J. Eq. 476, with the cases there cited, is conclusive in favor of complainants on that point. It follows that the complainants are entitled to the benefit of their mortgage, as a lien prior to any of the judgments under the attachment, unless the conduct of their testator in himself issuing an attachment, and putting his claim under the first attachment, and obtaining a judgment thereunder, can be held as a waiver of his lien under his mortgage.

It is well settled by a long series of decisions in New Jersey that the obligee of a bond secured by a mortgage does not waive his mortgage lien by suing at law upon his bond, and recovering judgment, and issuing execution, and levying upon the mortgaged premises. It is, however, inequitable for the mortgagee to proceed to a sale of the mortgaged premises; and this court will restrain him in so doing at the instance of the owner of the equity. The cases in this State are collected and commented upon by Chancellor Runyon in Lydecker *v.* Bogert, 38 N. J. Eq. 136. It follows plainly that, by merely issuing a general attachment against the defendant upon the debt secured by his mortgage, Mr. Grafflin did nothing to disturb his lien under the mortgage. While it does not appear that any other property besides the mortgaged premises were seized under that attachment, the contrary does not appear; and it was perfectly proper for him to issue the attachment he did, and also to come in as a creditor under the previous attachment, with the view of getting the benefit of any other property which might be found and subjected to the lien of the process. Besides, the position

of a plaintiff in attachment gave him a standing in this court as the complainant in a suit to set aside the previous conveyance and mortgage, under the rule established in Hunt *v.* Field, 9 N. J. Eq. 36; Williams *v.* Michenor, 11 N. J. Eq. 520. It follows that nothing that the complainant has done can be construed as either a discharge or waiver of his lien under the mortgage. The apparent hardship of this result is much softened by the circumstance that the mortgagee proceeded, unaided by the defendants, to bring suit and remove out of the way the fraudulent conveyance made by Lawton, which, unassailed, was a complete bar to any success on their part. Complainants are entitled to a decree.

On the argument the point was made that the mortgage can only stand as security for the amount which was due the mortgagee at the time it was made and delivered, and which, it is insisted, was only $56,689.82, and that against that sum should be credited all the payments which were made by Lawton on account after that date, which amount to upward of $30,000. I cannot adopt that view. The mortgage was evidently given to secure the amount due at its date, and also future advances; and it is perfectly well settled in New Jersey that a mortgage for future advances is good for all the money advanced under it up to such time as some third party shall have acquired an interest by mortgage, conveyance, or judgment in the mortgaged premises, and notice thereof be given to the holder of the mortgage to secure advances. No defense of any such lien or interest in this case prior to the 17th of March, 1887, is made, and the complainants did not claim for any moneys advanced after that time. In fact, none were advanced.

On examination of Mr. Rogers before a commissioner in Baltimore, counsel for one of the defendants, in the course of cross-examination, interpolated into his questions what purported to be extracts from the testimony of Mr. Grafflin taken in some suit in Maryland in which he (Grafflin) was a defendant. Objection was made to that mode of examination. The deposition itself, if any such there be, was possibly competent evidence, but it was not offered. Counsel for one of the defendants referred to these supposed extracts from the evidence of Mr. Grafflin as evidence in this cause, but they cannot be so construed. There is not the least particle of proof before the court that Mr. Grafflin ever swore to anything of the kind, and it would be highly improper to pay any attention to mere extracts from a deposition without having the whole before the court.

One other matter remains. It appears that complainants hold, as collateral to Lawton's indebtedness to them, certain

shares of stock in an incorporated company, and the defendants contend that they are not entitled to a decree in this court until they shall have exhausted their remedy by a sale of these shares of stock. The proof shows that the shares of stock are probably of very little value; but, however small their value may be, the equity by the defendants was not seriously resisted by the complainants' counsel at the argument, and, as I recollect, he offered to have them so appropriated. It does not seem to me necessary that the proceedings in this cause should stand until those shares are sold. The result may be attained by placing them within the power of the court; and upon depositing with the clerk of the court the certificate, with a transfer in blank executed by the complainants, a decree will be made.

There will be a reference, if the defendants desire to dispute the amount complainants claim to be due; but it hardly seems to be worth while, in face of the fact that the auditor in attachment passed upon the complainants' claim, and judgment has been rendered upon it in the attachment suit to which all the defendants were parties.

Mortgage for the Support of the Mortgagee.

Cook *v.* Bartholomew, 66 Conn. 24; 22 A. 444.

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts, — an ordinary deed for the consideration of $900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook, as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life; that he will provide for all her wants in a reasonable and proper way; will provide her with all needed food, drink, and clothing; have a room and fire when needed; lodging and every necessary comfort, both in sickness and health; and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void; otherwise to remain in full force and effect in law." The com-

plaint also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved. Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? A mortgage is a contract of sale executed, with power to redeem. * * * The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing of any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. * * * A bond or note is usually taken for the debt, which is described in the deed with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift Dig. 182, 183. "To constitute a mortgage, the conveyance must be made to secure the payment of a debt." Bacon *v.* Brown, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." Jarvis *v.* Woodruff, 22 Conn. 548. What is a debt? "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webst. Dict. What is this case? Ammon Bostwick received $900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her, and to erect a tombstone to her memory. To secure the performance of this agreement, he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty, — the payment of that debt. The obligation falls within an approved definition of "debt," and the conveyance is within the legal definition of a "mortgage." There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course, there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done, and that is sufficient for all the purposes of sub-

stantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents. In this case the age, health, general condition, and expectation of life of Sarah A. Bostwick must be known. Add to these the probable cost of supporting her for one year, and we have the *data* for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved 14 years ago. They then, as it seems, fixed the outside limit at $900. The same thing can be done now as well as then. Possibly $900 may be considered an equitable limit, beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer. Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement. The court of common pleas is advised to overrule the demurrer. The other judges concur.

Mortgagor's Possession at Common Law — Right to Sell Timber.

Stewart *v.* Scott, 54 Ark. 187; 15 S. W. 463.

Cockrill, C. J. It is conceded that the only questions arising upon this appeal relate to Scott's set-off to Stewart's action against him. The set-off is based upon an agreement for the sale of timber, to be delivered at the stump by Scott, the vendor, to Stewart. The purchase price was to be the cost of cutting, and an agreed sum per thousand feet. The contract was in writing. After its execution Stewart concluded that he could have the timber cut cheaper than Scott could, and expressed a determination to undertake it. Scott acquiesced. Stewart cut and appropriated about one-half of the quantity agreed upon, and refused to take the residue. The court, against Stewart's objection, received evidence of the number of feet of timber in the trees covered by the contract, and which were rejected by Stewart, and left growing upon the land, and charged the jury that they might return a verdict against him for a sum equal to

the contract price of the timber they contained. These rulings are assigned as error.

Without laying stress upon the want of a certain description in the written contract of the lands upon which the trees stood, it is enough to say that it was an executory contract to sell timber, which (in part) was never completed by delivery. After the vendee refused to proceed in execution of the contract, the vendor did not make an offer of delivery in accordance with the terms of the written contract, but retained the trees in their natural state. The measure of his recovery, therefore, would not be the contract price of delivered timber, but the damages sustained by reason of the vendee's breach of contract. But these damages are unliquidated, and unliquidated damages, even when arising from breach of contract, are not the subject of set-off, though they may be recouped in a proper case. Gerson *v.* Slemmons, 30 Ark. 50; Bloom *v.* Lehman, 27 Ark. 489; Clause *v.* Printing Co., 118 Ill. 612; 9 N. E. Rep. 201; Holland *v.* Rea, 48 Mich. 218; 12 N. W. Rep. 167; Carter *v.* Jaseph, 48 Mich. 615; 12 N. W. Rep. 876. The court erred in admitting the testimony and giving the instruction referred to.

When the contract for the sale of the timber was entered into, Scott, the owner, was in possession of the land, but there was a subsisting mortgage upon it executed by him to secure a debt due to a non-resident firm. It is argued that the contract of sale is void, and that no recovery can be had for the timber actually delivered under it, because it was made in contravention of the statute enacted to punish persons who fell trees upon another's land without his consent. Two provisions of the law are appealed to to sustain the contention, viz., Sections 1658, 1659, *et seq.* Mansf. Dig. But it is not apparent that the legislature intended that either provision should embrace a mortgagor in possession. One section is directed at "every person who shall commit any trepress * * * upon the lands of any other person" (section 1658, Supp.); and the other against those who, "without lawful authority, willfully and knowingly enter upon lands belonging to the State," or to any corporation or person, other than the party accused. Section 1659, 1663, *Id.* The mortgagee is in common entitled to the possession of the mortgaged lands, but until he takes it legally the possession of the mortgagor is not illegal, and his entry is not in itself a trespass. He is not, therefore, within the letter of the statute. Moreover, the expressed intent of the legislature is to visit punishment only upon those who cut trees upon the lands of another. In popular acceptation, the

mortgagor remains the owner of the land and the popular belief is not far from legal accuracy. It is common to say that the legal title vests in the mortgagee, but his interest is regarded as a title only for the purpose of enforcing his equities. It lacks many of the essentials of a title. He has no interest that can be sold on execution, and his widow does not take dower in his interest in the land, notwithstanding the statute makes every substantial interest in real estate subject to sale under execution, and the subject of dower. A power to sell is not necessarily a power to mortgage, nor a power to mortgage a power to sell; and it is held that giving a mortgage upon land by one who has already conveyed his title by deed is not disposing of the land within the meaning of a statute which made it a felony to make a fraudulent second sale. People *v.* Cox, 45 Cal. 342. Payment of the debt at its maturity destroys the estate without a reconveyance or release by the mortgagee. Schearff *v.* Dodge, 33 Ark. 340. Equity always regards the mortgagor as the owner of the land, and the mortgagee as holding a security only for his debt, and a court of law, in a controversy between the mortgagor and a stranger to the mortgage, does not regard the mortgage as a conveyance. For example, in a suit by the mortgagor for possession, it is no answer for the stranger to say that the title is in another by virtue of the mortgage. "It is an affront to common sense," said Lord Mansfield in Rex *v.* St. Michaels, 2 Doug. 632, "to say the mortgagor is not the real owner." If, then, in popular and legal acceptation, the mortgagor is the owner of the land, there is no reason for attributing to the legislature the intent to punish him under the provision of the law referred to. There is a limit upon his right, as against the mortgagee, to cut trees growing upon the mortgaged premises, but the statute does not purport to punish waste as distinguished from trespass. A rational construction of the act does not require an expansion of its terms to meet that class of cases. It is a statutory crime also to sell mortgaged property with intent to defraud the mortgagee. Mansf. Dig., § 1693, as amended by Acts 1885, p. 120. As the mortgage lien continues to bind the trees grown upon the land after they are severed from the soil, a sale of them, made for the purpose of defrauding the mortgagee, would be in the face of the statute. A contract for that purpose would therefore be void, and the courts would refuse to enforce it. O'Bryan *v.* Fitzpatrick, 48 Ark. 487; 3 S. W. Rep. 527. But there was no evidence at the trial which conclusively stamps the transaction as a fraud upon the mortgagee. It was proved only that 1,560 acres of land had been mortgaged to

secure a debt of $2,500. The value of the land, without the timber, may have been so greatly in excess of the mortgage debt that no intent to defraud the mortgagee could be presumed. The court was not asked to direct the jury to consider the question of fraud, and there was no error in the refusal to charge as requested, on the theory that the contract contravened the other sections of the statute first cited above. But for the errors indicated it is ordered that the judgment be reversed, and the cause remanded for a new trial.

Mortgagee's Right to the Possession.

Townshend *v.* Thompson, 139 N. Y. 152; 34 N. E. 891.

EARL, J. This is an action of ejectment to recover a lot of land situate at the southwest corner of Eighth avenue and 117th street, New York City. The plaintiff's title does not appear to be very meritorious, and the court ought not to be very astute to uphold it. Both parties trace their title back to Edward Price, who took a conveyance of the lot in 1827. The plaintiff claims title under him as follows: In 1835 he conveyed the lot to John Scudder, and took back a purchase money mortgage. In 1836 Scudder conveyed the lot to Ebenezer L. Williams, subject to the mortgage. February 4, 1853, Williams was adjudged a bankrupt, upon his own petition, under the bankrupt act of 1841, and William C. H. Waddell, the official assignee in bankruptcy, became his assignee, and all his estates at once vested in him; and on the 27th day of May, 1843, Williams received his discharge from his debts. On March 1, 1869, the assignee, by order of the court, sold and conveyed this lot, with five other adjoining lots, to George Law, for the consideration of $2,150; and on the 10th day of January, 1873, Law, for the consideration of $500, conveyed the same lots to the plaintiff. During all these years — more than twenty-six — before the sale to Law, there is no pretense that the assignee had any actual possession of the lots, or that he ever exercised any acts of control or ownership over them, except as follows: February 8, 1845, he filed a report in which he stated that these six lots, among other assets, were subject to two mortgages, and were of uncertain value, and ought to be disposed of at public sale without incurring further expense or delay. It does not appear that any formal order was then made for the sale of these lots. They were marked "Worthless" in an inventory of the assets made by the assignee. He being dead at the time of the trial of this action, his account book, found in the posses-

sion of the plaintiff's attorney, was put in evidence, in which appeared an entry showing that he had sold the lots on the 23d day of March, 1846, for 13 cents. In February, 1867, the assignee presented a further report to the court, in which he stated that an application had been made to him to procure all the interest which the bankrupt had, and which became vested in him as assignee, in the six lots, and that Price had foreclosed his mortgage on the lots without serving any notice on the assignee, and had obtained possession of them, and that the application was to procure his interest in the lots for "a nominal consideration, and the costs of the assignee and his counsel therein, the title hereby sought being of no pecuniary value to his estate." Upon this report an order was made for the sale of the property at private sale. In January, 1869, the assignee made another report, in which he stated again that application had been made to him for the purchase of the lots for a nominal consideration, and the costs of the assignee and his counsel therein, the title sought being of no pecuniary value to the estate. Upon this report an order was made, authorizing the sale of the lots at public auction, and, as above stated, they were sold and conveyed to Law. It is clearly inferable that John Townshend, the plaintiff's husband, and her attorney in this action, instigated these proceedings of the assignee in the years 1867 and 1869, and that he was his friendly counsel therein. The fact that the lots were not sold for a nominal consideration must have been a disappointment to some one. It is not probable that the man who paid $2,150 for the lots was the person who was seeking to procure them for a nominal consideration. But Law, as an obstacle, was soon disposed of. On the 5th day of February, 1870, John Townshend, without an atom of record title, and, so far as this record discloses, without any title whatever, conveyed the lots to his daughter, for a consideration of one dollar, by a deed containing full covenants, in which was the statement that the lots were then in the occupation of his tenant, John H. Bischoff. Law's title being thus menaced, he conveyed the lots to the plaintiff at a loss of $1,650, besides interest. But the final scene in this interesting drama is still to come. Of the purchase money paid by Law, $2,000 was paid to the clerk of the court. Steps were immediately taken by Townshend, as attorney for Wesley S. Yard, receiver of the Trust Fire Insurance Company, to reach this money. The insurance company had obtained against Williams a deficiency judgment in a foreclosure sale for upwards of $2,000 in October, 1842, and that judgment was specified as a liability of the

bankrupt in the schedules annexed to his petition to be declared a bankrupt in 1843. Although about 27 years had elapsed since he was declared a bankrupt, this debt had not been proved, and in fact no debt had been proved. Now, Townshend, appearing as attorney for receiver, caused the debt to be proved; and such proceedings were taken by him (no other debt having been proved) that the whole $2,000, less costs, — about $75, — was paid to the receiver in September, 1870. The result of all these proceedings in bankruptcy was that Mrs. Townshend had a conveyance of these lots, and some one had the proceeds of the sale by the assignee; and the only loser seems to have been Law, who unwittingly bid off the lots at the assignee's auction sale. The plaintiff did not seem to be in haste to take possession of these lots, and indeed it does not appear that she ever took possession of them. In 1875 Mr. Townshend first appeared at the lots, and, as he testified, finding them unoccupied he then caused a fence to be put around them, which remained there a few months, and then disappeared. Before the fence was built, according to the testimony of one of the plaintiff's witnesses, the lots were occupied by a gardener, and the fence was built to keep him out. It does not appear whether in building the fence, Mr. Townshend acted for himself, or for his daughter, or for his wife. He testified that in 1878 he received a notice from the commissioner of public works to repair the curb and gutter stones in front of the lots, and that in compliance with the notice he made the repairs, as the agent of his wife. Frederick S. Wieck, one of the plaintiff's witnesses, testified that he took from Mr. Townshend a lease of the lots in 1883, and occupied them for about four years, and that he was in possession of the lots now in question before he took the lease. It does not appear that, in making this lease, Mr. Townsend acted for the plaintiff. These are all the acts of ownership exercised over these lots by Mr. and Mrs. Townshend at any time, and neither of them ever paid any taxes upon the lot, or assumed any of the burdens of ownership, except the slight repairs to the gutters in front of the lots. These are the facts and incidents attending the plaintiff's title to this lot. The chain of title is apparently complete, and we may assume that it must prevail, unless it has been subverted by the facts yet to be stated.

As before stated, Price took back a purchase-money mortgage from Scudder, and that mortgage he foreclosed in chancery. The bill was filed November 21, 1845, and the decree of foreclosure was entered June 11, 1846. Price bid off the property, and the master's deed to him was executed September 8, 1846;

and then he went into possession of the property, and remained in possession until January 26, 1855, when he died intestate, leaving several children, his only heirs at law. Scudder and various junior incumbrancers were made defendants in the foreclosure suit. But Waddell was not made a party, and hence, as to him, the foreclosure was ineffectual, and his title remained unaffected thereby. In February, 1858, an action was commenced by one of Price's heirs against the others for a partition of the real estate left by him, including the six lots, and judgment of partition was entered, and the property was sold; but no conveyance of this lot was made, probably on account of the defective foreclosure of the mortgage. Thereafter, in December, 1858, for the purpose of perfecting the record title by foreclosing the rights of Waddell as assignee, an action was commenced by Price's administrator to foreclose the mortgage against him. He was named in the action individually, and not as assignee. He appeared in the action, and on the consent of his attorney a judgment of foreclosure was entered; and in pursuance of that judgment the property was again sold, and conveyed to Mrs. Coulter, one of the heirs, January 28, 1859. This foreclosure was still ineffectual to cut off the rights of the assignee, because he was not made a party in his representative capacity. The foreclosure was, however, believed to be effectual until, in 1889, we held in the case of Landon *v.* Townshend, reported in 112 N. Y. 93; 19 N. E. Rep. 424, that it was ineffectual, on the ground stated. The other heirs of Price conveyed their interests in the lots to Mrs. Coulter at various times between the last foreclosure sale and March 25, 1863. The subsequent conveyances of the lot were as follows: Mrs. Coulter to Donovan, April 10, 1863; Donovan to Adams, May 8, 1863; Adams to Whitbeck, March 25, 1864; Whitbeck to Andrew, April 1, 1867; and Andrew to William Thompson, March 9, 1868. Thompson died January 13, 1872, leaving all his right and title to the lot to these defendants, his widow and children. It thus appears that the defendant's chain of title is complete, but for the defective foreclosure of the Scudder mortgage; and we will assume, without passing upon other grounds of defense presented for our consideration, that the defendants must rely for their defense upon that mortgage, and the possession of the lot by them and their predecessors.

A purchaser at a mortgage foreclosure sale, defective and void, as against the owner of the equity of redemption, because he was not made a party to the foreclosure action, becomes assignee of the mortgage, and, if he lawfully enters into possession of the real estate purchased, he becomes a mortgagee in

possession. Robinson *v.* Ryan, 25 N. Y. 320; Winslow *v.* Clark, 47 N. Y. 261; Miner *v.* Beekman, 50 N. Y. 337; Thom. Mortg. (2d Ed.) c. 8. Therefore, when Price purchased at the defective foreclosure sale, in 1846, he became assignee of the mortgage, and when his administrator again foreclosed the mortgage, in 1859, and Mrs. Coulter became the purchaser, she became the assignee of the mortgage; and the mortgage passed to the subsequent grantees of the real estate, and to these defendants upon the death of the last grantee. It is undisputed that Price, under his purchase at the foreclosure sale, entered into possession of this lot, and continued to possess it until his death in 1855. His entry was lawful, under color of right, and was acquiesced in by Waddell, the assignee. After his death his children, including Mrs. Coulter, were in the possession of the lot, through their tenants, and that possession, with some interruptions, has been continued by these defendants and their predecessors to this day. This lot was generally uninclosed, and was used as a garden by market gardeners. In the winter it was necessarily unoccupied, and in the summers it was cultivated and possessed that way. Price, having taken lawful possession, never surrendered his possession. His children took possession from him, and neither they nor any of their successors in the title voluntarily surrendered the possession, or even intended to abandon the possession. They always paid the taxes upon the lot, and always claimed title to the same. Their position as mortgagees in possession, having been once acquired, continued, unless they in some way surrendered or abandoned it. It was not destroyed by the unlawful interference of Townsend, or any other person. It does not appear that they ever acquiesced in, or ever knew of, his pretended possession or interference with the lot. A mortgagee who has lawfully taken possession of the mortgaged premises cannot be ousted or deprived of his rights as such by the mere instruction of the owner of the equity of redemption against his will, or without his knowledge. There must be some act of omission on his part indicating a change in his position. The mortgagee who has taken lawful possession of the land pledged for his debt is not obliged to stand upon the land with a club, to keep off intruders, nor need his continued possession be of such a character as is required by the statute to create a title by adverse possession. If the land be uninclosed, he is not bound to inclose it or to cultivate it. Having taken possession lawfully, with the assent of the mortgagor or his successor, his relation to the land is not changed until, by some act or omission of his, he intentionally changes it. He may abandon or surrender the possession, or, what is the same

thing, he may acquiesce in the possession of the mortgagor or his successors, thereby indicating his surrender of the pledge. Here there is not an atom of evidence tending to show that any of the parties holding under the mortgage ever intended to surrender the land, or that they knew of any possession by the plaintiff or her pretended agent, or by any act under a lease from him to her.

So, too, a mortgagee once lawfully in possession of the land, who has been wrongfully deprived of the possession by the mortgagor or any other intruder, may resume his possession, if he can, and again hold the pledge in possession. Never having voluntarily surrendered or abandoned the possession, he has not lost his right to the possession, and he may again peaceably enter into possession, and thus be restored to his rightful position as mortgagee in possession. Here it is undisputed that these defendants were in possession of the lot at the time of the commencement of this action, and for some years prior thereto. Our conclusion, therefore, is that they are at least entitled to the position of mortgagees in possession, and that hence this action cannot be maintained against them. As this conclusion is sufficient for the affirmance of this judgment, we do not deem it important to inquire whether the defendants have any other grounds of defense to the action. The judgment should be affirmed with costs. All concur.

Tenure Between Mortgagor and Mortgagee, in Respect to Purchase of Outstanding Title.

Turner *v.* Littlefield, 142 Ill. 630; 32 N. E. 522.

Craig, J. This was a bill in equity, brought by Otis A. Turner against Eaton Littlefield and others, in which the complainant seeks to have a certain deed made by the sheriff of Adams County to Littlefield and William H. Collins, executed December 2, 1879, purporting to convey certain lands, and a certain agreement executed by the Rutherfords and Littlefield and Collins, declared a mortgage, with right of redemption, as a judgment creditor, and the right to a sale of the lands in satisfaction of his judgment after the payment of the amount of advances made by Littlefield under the deed and agreement. The record in this case is somewhat voluminous, but as to the main facts upon which the decision of the case rests, there is no substantial controversy. On the 13th day of April, 1878, William Marsh obtained a judgment in the circuit court of Adams County against Reuben C. and Rebecca

M. Rutherford for $5,750, upon which an execution issued April 30, 1878, directed to the sheriff of Adams County. The sheriff of Adams County levied on the following lands in said county, the property of Rebecca M. Rutherford, viz.: S. W. N. E. 31, S. ½ N. W. 31, 56 acres off north end E. ½ S. W. 31, the E. ½ S. W. 34, and S. W. N. E. 34, all in township 1 S., range 8 W.; and also S. ½ N. W. 6, 2 S., 8 W., except a part of the last-named tract set off for homestead. And on June 1, 1878, at a sale on said execution, all of said real estate was sold to William Marsh; the part set off for homestead alone excepted. On May 30, 1879, Robert McComb obtained a judgment in the Adams County circuit court against the Rutherfords for $715.04. Execution issued on this judgment August 22, 1879. McComb redeemed said premises from the sale under the Marsh judgment by paying to the sheriff the proper amount of redemption money, and the McComb execution was levied on the premises, the part set off for homestead excepted, and on September 18, 1879, a sale under the levy on the McComb execution was made at the court house by the sheriff of Adams county. The lands in section 31, aforesaid, were sold, and a certificate of purchase therefor was given to Eaton Littlefield and William H. Collins. The balance of the lands was sold to other parties. On December 2, 1879, the time of redemption having expired, and no further redemption having been made, the sheriff executed a deed to Littlefield and Collins for the lands they bid off in section 31. It also appears that an agreement was executed by Littlefield and Collins, and the two Rutherfords, bearing date September 18, 1879, which recites that Marsh had obtained a judgment heretofore mentioned, and that a sale of the lands in execution issued thereon. The agreement then recites that Robert McComb had also obtained a judgment as heretofore stated. The agreement then proceeds as follows: "And whereas, the said Robert McComb, as a judgment creditor, has redeemed the above and foregoing described property (excepting the property lying in section thirty-four [34] as above described) by paying the said Marsh the full amount of his claim thereon; and whereas, Eaton Littlefield and William H. Collins furnished the money for the payment of a portion of the said Marsh's claim, namely, about four thousand dollars ($4,000), to said McComb: Therefore it is understood and agreed that the said Littlefield and Collins are to take a sheriff's deed of the following described property (when sold to satisfy the aforesaid judgment of the said Robert McComb), to wit, the southwest quarter of the northeast quarter of section thirty-one

(31), in township one (1) south of the base line, and range eight (8) west of the fourth principal meridian; also the south half of the northwest quarter of said section thirty-one (31); also fifty-six (56) acres off the north end of the east half of the southwest quarter of said section thirty-one (31), subject to prior incumbrances, — such deed to be treated as a mortgage, and said property to be held in trust for the benefit of said Reuben C. and Rebecca M. Rutherford and their heirs or legal representatives, and as a security to the said Eaton Littlefield and William H. Collins for the repayment to them of the said sum of four thousand dollars ($4,000), with the interest thereon annually. And it is further understood and agreed that if, at any time within five years from the date of the said sheriff's deed to the said Eaton Littlefield and William H. Collins, the said Reuben C. and Rebecca M. Rutherford, or either of them, or their heirs, executors, administrators, or assigns, shall repay the said sum of four thousand dollars ($4,000), with interest thereon at the rate of eight per cent per annum from the 22d day of August, A. D. 1879, together with all money advanced or loaned to said Rebecca M. and Reuben C. Rutherford by said Eaton Littlefield and William H. Collins, or either of them; also all money advanced or paid by said Littlefield and Collins, or either of them on the principal or interest that has already accrued or may accrue on any prior liens or incumbrances on said lands, or for taxes, or for any necessary repairs, or for maintaining or keeping in repair the fences on said land, with interest at the rate of eight per cent per annum, — to the said Eaton Littlefield and William H. Collins, or their legal representatives, then the said Littlefield and Collins shall, and they do hereby agree for themselves, their heirs, and executors, administrators, or assigns, to reconvey the last-above described real estate, situate in section thirty-one (31), township one (1), to the said Reuben C. and Rebecca M. Rutherford, or either of them, or their legal representatives. And it is further understood and agreed between the said Eaton Littlefield and William H. Collins and the said Reuben C. and Rebecca M. Rutherford, and all parties concerned, that, in case the said Reuben C. and Rebecca M. Rutherford, or either of them, or their legal representatives, creditors, or assigns, shall fail to repay the said sum of four thousand dollars ($4,000), with interest thereon, and other sums or moneys as above mentioned, to the said Eaton Littlefield, William H. Collins, or their legal representatives, within the term of five years, as above specified, then the said sheriff deed to the said Eaton Littlefield and William H. Collins is to be considered and held by them as a deed absolute for them and their heirs forever.

In witness whereof we have hereunto set our hands and seals this 18th day of September, A. D. 1879, at Quincy, Illinois."

It also appears that at the time of the recovery of the March judgment and of the execution of the agreement dated September 18, 1879, said land in section 31 was subject to the lien of a deed of trust dated August 1, 1877, to George Castle, trustee, which was duly recorded in the recorder's office of Adams County, Ill.; that on the 14th day of September, 1882, William H. Collins and wife, by their quitclaim deed of that date, conveyed all their right, title, and interest in said land to said Littlefield; that on the 23d day of September, 1882, George Castle, as trustee, after duly advertising said trustee's sale, in pursuance of the power in said trust deed contained, sold said land to said Littlefield for the sum of $11,850, as bid by him at said trustee's sale, and made and delivered to said Littlefield his trustee's deed of that date, made and executed in pursuance of the power in said deed of trust contained; and that said trustee's deed was duly recorded in the recorder's office of Adams County on the 28th day of September, 1882. It also appears that on December 14, 1883, Alfred Gatchell recovered a judgment against the Rutherfords for $3,144. Execution was issued on the judgment during the year next following its rendition. On the 18th day of August, 1889, the judgment was assigned to Otis A. Turner, the complainant; and on the 19th day of August following, an execution was issued, and levied on the lands in section 31 heretofore described. On the same day the complainant filed this bill in aid of the execution. It also appears that on the 30th day of October, 1884, Reuben C. and Rebecca M. Rutherford, by quitclaim deed of that date, conveyed said premises to Littlefield.

It is insisted by complainant that the sheriff's deed to Littlefield and Collins, dated December 2, 1879, and the agreement dated September 18, 1879, which showed the terms and conditions upon which the lands were redeemed under the McComb judgment, constituted a mortgage; while, on the other hand, it is claimed that the deed is an absolute conveyance, and the agreement was a mere contract providing for a reconveyance to the Rutherfords if within five years they should repay the $4,000 and interest, and the other sums mentioned in the agreement, which they failed to do. Much of the argument is devoted to a discussion of the question whether the Marsh deed was a mortgage or an agreement for a resale, and many authorities have been cited by counsel which are claimed to sustain their respective positions on this branch of the case. We shall not,

however, stop to review the authorities or determine that question, as, in our judgment, the decision of the case does not hinge upon that question. As has been seen, at the time Littlefield and Collins purchased the property at sheriff's sale, the lands were incumbered by a deed of trust executed and recorded in 1877. Under this prior lien the property was sold, and purchased by Littlefield on the 23d day of September, 1882, long before the complainant's judgment was rendered. As the deed of trust under which this sale was made was the first lien on the property, it is plain, if the sale was made in conformity to the terms and conditions of the deed of trust and Littlefield had the right to purchase the property at the sale, then he acquired the title regardless of the prior sale by the sheriff, and the contract executed in pursuance of such sale, under which the Rutherfords had the right to redeem or repurchase within a specified time. It is a fact beyond dispute that the sale was made in conformity to the terms of the deed of trust. No unfairness is charged or claimed from any quarter. The debt secured by the deed of trust was a valid obligation, and the deed of trust executed to secure it was the first lien on the property. But while it is conceded that the sale was in all respects, regular and in conformity to the terms of the deed of trust, and that Littlefield purchased at the sale and obtained a deed, yet it is insisted that Littlefield occupied such relations to the Rutherfords in regard to the property that he was precluded from becoming the purchaser at the trustee's sale. After Littlefield and Collins purchased at the sheriff's sale, they paid all taxes on the property from year to year, until Collins sold out to Littlefield, and from that time until the present he has paid all taxes. After the sheriff's sale, the possession of the property passed into the hands of Littlefield, and he testified that at the sheriff's sale he notified Rutherford that he had no right to any further rents; "that the land was ours." "He acknowledged it, and said he could not live unless we allowed him to have the rents." Littlefield and Collins finally consented that Rutherford might have the rents for a time, and he received the rents for the years 1880, 1881, and 1882. In 1879, Littlefield paid the interest on the Castle trust deed, and continued to pay it until the sale in 1882. In 1882 Littlefield became dissatisfied with the situation of the property, and called upon Rutherford to determine whether he could repay the advances which had been made, and take the property, or abandon it; and he testified (and in this he is not contradicted) that Rutherford acknowledged his inability to take the property, and he then abandoned and gave up. This was a short time before the sale under the deed of

trust. His testimony, as shown in the abstract, on this point was as follows: "As I said, I did not know whether I was out of the house or not. I met Dr. Rutherford, and told the doctor in June, 1882, that we had waited nearly three years, and I wanted to know whether he was going to buy the property; that we had paid out all the money. Redeeming was never mentioned between us at any time. I never had any conversation until about that time about his buying. I stated that the property, instead of increasing was decreasing in value. I stated the amount that it had cost, and what it cost to pay the Castle trust deed; and I wanted to know whether he could raise the money and buy the property, or whether he intended to do it. I also stated the amount due, when we had the conversation, that he was owing. The amount that it would take to purchase the property in section 31, and pay his debts, was over $40,000. He stated that he could not pay them; that he must give up all hope and did give up all hope; that he must turn his attention to try and save his home place — to save a portion of it. That was the conversation at the time."

It is true that the Rutherfords had the right, if they saw proper to insist upon it, under the contract of September 18, 1879, to repurchase at any time within five years from the date of the contract by repaying all advances; but, if they discovered their inability to perform the contract at any time before the expiration of five years, no reason is perceived why they might not abandon the contract and surrender all rights under it. And if this was done, then, after such abandonment, it seems clear Littlefield would have the same right to purchase under the trustee's sale that a stranger to the transaction would have. If Littlefield had purchased at the trustee's sale without first calling upon the Rutherfords to determine whether they intended to repay the moneys he had advanced, and rely upon the contract under which he procured title at the sheriff's sale, that might be ground for holding that he was in a position to purchase and acquire an outstanding title which he could set up as against them. But this he did not do. He had never assumed the Castle deed of trust, and was under no obligation to pay it; but for the purpose of protecting the title he had acquired at the sheriff's sale he voluntarily paid the interest on the deed of trust from 1879 to 1882, paying out in interest over $2,000. As the property was not advancing in value, he then became apprehensive that the property was not of sufficient value to repay his advances, and at the same time pay the deed of trust, which, of course, had to be paid, or all the advances made by him would be lost. In this condition of things, he called on the Rutherfords, and requested

them to determine what course they would pursue, — whether they would raise the money to pay the advances on the property or abandon it. They, not being able to raise the money necessary to pay the advances, elected to abandon the property, and so notified Littlefield. Under such circumstances, he had the undoubted right, for the purpose of protecting himself, to purchase at the trustee's sale. After the Rutherfords notified him that they were unable to perform the contract, and abandoned whatever claim or right they had under it, there was no longer any equitable relation existing between him and them which would forbid him from purchasing the property at the trustee's sale, and relying upon such title, not only as against them, but their creditors. The fact that the Rutherfords had abandoned all claims to the property under the contract before the sale under the deed of trust does not rest entirely in the evidence heretofore alluded to. After the sale in 1882, Littlefield assumed the entire control of the property. No rents were paid to the Rutherfords after that year, nor did they exercise, or assume to exercise, any control or management of the property; and in October, 1884, they executed and delivered to Littlefield a quit-claim deed of the property. It is not claimed or pretended that any title passed by this last-mentioned deed, but the execution and delivery of the deed is a fact proper for consideration in corroboration of the testimony of the defendant that the Rutherfords had abandoned all claim to the property before the sale under the trust deed. In the argument much stress is placed on the fact that Littlefield requested the trustee to make the sale under the deed of trust. We do not think this fact affects the validity of the sale. For four years Littlefield had paid the interest on the deed of trust, and all taxes on the land. The original sum advanced by him at the sheriff's sale remained unpaid, and, owing to the embarrassed financial condition of the Rutherfords, there was no prospect of recovering anything from them. Under such circumstances, after the Rutherfords had declared their inability to repurchase or redeem the property, we think Littlefield had the undoubted right to call upon the trustee to sell. Indeed, if Littlefield had declined to pay the interest on the trust deed, and he was under no obligation to pay it, a sale of the property would have been the same, whether he had requested it or not. Littlefield made no effort to conceal the fact that the property would be sold under the deed of trust. The sale was a public one, and attended by the Rutherfords, and so far as it appears, there was nothing in the conduct of Littlefield in connection with the sale liable to censure. The judgment of the appellate court will be affirmed.

Rights of Assignee of Mortgagee.

Magie *v.* Reynolds, 51 N. J. Eq. 113; 26 A. 150.

Pitney, V. C. This is, in form, a bill to foreclose a mortgage. The mortgagors, Reynolds and wife, set up fraud in its procurement, and by cross bill ask that it be delivered up to be canceled. The ultimate question in the cause is, which of two innocent parties — the complainant on the one side, or Reynolds and his wife on the other — shall suffer by the fraudulent practices of a third party? The mortgage thought to be foreclosed was executed by the defendants, Reynolds and wife, to Emma A. Sumner, the wife of Perrin H. Sumner, on the 2d of January, 1889. It was assigned by Mrs. Sumner to the defendant, Benjamin G. Bloss, on the 18th of December, 1889, and again by Bloss to the complainant on the 15th of March, 1890. The mortgage covers a small farm and dwelling situate at Maywood, near Hackensack, Bergen County, N. J. The particulars of the fraud set up in the answer and cross bill are as follows: That Reynolds was the owner of the farm above mentioned, upon which there was an undeveloped brown stone quarry, and being desirous to have it developed, he applied to Sumner to assist him therein, and that Sumner undertook to do so, but that he required some security to be given to investors whom he might interest in it that it would turn out upon experiment that there was a sufficient quantity of marketable stone upon the premises, and for that purpose induced the defendants to execute the bond and mortgage in question; and they allege that in point of fact they received no consideration whatever for the mortgage, except as follows: That Sumner, upon their objecting to giving a mortgage under the circumstances and for the purpose just stated, proposed to give them a counter indemnity in the shape of a one-tenth interest in a farm containing 525 acres, situate at Manor, in Suffolk County, L. I., which Sumner then pretended to own, and stated to them that it was worth $50,000, and that, relying upon the representations, statements, and promises of Sumner, they took a deed from Sumner for a one-tenth interest in the said tract of land. That afterwards Sumner informed them that he had agreed to sell his interest in the farm to Bloss, and that, in order to enable him to make a conveyance, it was necessary that the defendants should return to him, Sumner, the deed which they had received from him, and which had not been recorded, and that for such surrender Sumner would give them a consideration in valuable gold mining stock, from which could at once be realized a sum sufficient to operate the quarry.

Believing these representations, they surrendered the deed to Sumner, and thereupon received a quantity of gold mining stock; and by way of making them believe that the stock was valuable, Bloss loaned them $50 on a promissory note of Reynolds, and took as collateral one of the certificates of stock, representing 25 shares of the stock in a gold mine. That the said shares of stock turned out to be utterly valueless, and that Sumner promised to return the bond and mortgage and deliver it up to be canceled. The replication to this cross bill sets up that the mortgage was given for a full consideration, namely, the conveyance of the interest in the Long Island farm, and denies the allegations that the mortgage and conveyance were made by way of indemnity and counter indemnity.

The facts are that Reynolds was a retired officer in the marine service of the United States, having attained the rank of captain, and reached the age of about 65 years, and having been dropped or discharged from the service, and being very poor and without means of support, and having no property except the farm in question. He was a man of no business training or capacity whatever, of slender intellect, and entirely unfit to take care of himself in dealing with a shrewd man of the world. His wife was some years his junior, with the ordinary capacity of an American wife, and without any experience in business. They were very poor, and the captain was anxious to obtain employment and occupation, and also to derive some income from the supposed stone quarry on his farm. Some time prior to the 1st of January, 1889, one Willis was the owner of the farm in question on Long Island, which was called the "Horn Tavern Farm," subject to a mortgage of $6,000, held by the Mutual Life Insurance Company of New York, and some judgments against Willis, and arrears of taxes, etc., and being desirous to sell the farm, he applied to Sumner to do it, and agreed to give him one-third of all he got over and above the incumbrance, and that Sumner procured a Dr. Marquet to take a one-third interest in it at a price actually paid of over $2,000, and Sumner received from Willis a conveyance for the other two-thirds to his son, Arthur E. Sumner, who subsequently, in December, 1888, conveyed it to Emma A. Sumner, so that Emma A. Sumner, on the last of December, 1888, had standing in her the title to two-thirds of this Long Island farm. I am satisfied from the evidence of Dr. Marquet and Bloss and the circumstances that the farm was worth nothing above the incumbrances. Such being the situation, in the middle or towards the last of the year 1888, Reynolds was introduced to

Mr. Sumner, who had an office in Broadway, New York, and solicited his aid in developing the stone quarry. Sumner immediately set about procuring a mortgage from the captain and his wife on their farm, and, according to their story, first tried to trade them some coal lands and other matters of that kind, and finally, as they both swear, he induced them to give him the mortgage in question, substantially under the circumstances and for the reasons set out in their answer and cross bill, viz., as an indemnity to secure persons taking an interest in the stone quarry, and that the conveyance of the tenth interest in the Long Island farm was given as a security to them against the mortgage. This evidence on their part is denied by Sumner, and, in point of fact, on the 31st of December, 1888, Capt. Reynolds and wife and Arthur E. Sumner entered into a contract in writing, which is made up partly of print and partly of manuscript, and is full of interlineations and erasures, so that it is quite difficult to decipher, and some of the interlineations are in different ink from the other part of the writing. None of them are noted, so that it is impossible now to determine from the face of the paper what parts were actually written in it at the time it was signed. The purport of it is that Capt. Reynolds and wife, in consideration of one dollar, agreed to grant and convey unto Arthur E. Sumner a first mortgage and bond on the Bergen county farm, to be due in five years from the date, to bear interest at the rate of 6 per cent per annum, semi-annually; and Sumner agreed to grant and convey unto Reynolds and wife an undivided one-tenth interest in and to the Long Island farm by quit-claim deed, but, in case the land in the meantime should be deeded to a company, Reynolds was to have one-eighth of the surplus stock of the company after the treasury stock had been deducted. It is stated in the contract that the entire tract of land was subject to a mortgage of $6,000, held by the Mutual Life Insurance Company of New York, and other liens, judgments and taxes and that the judgments are to be taken care of and paid by L. Marquet as per his agreement; that the deed or the stock in the company to be formed to develop the Long Island farm were to be delivered on or about the 25th day of June, 1889, but the mortgage was to be delivered directly, the mortgage to be made to Sumner, or to any one he might designate; and there is an interlineation in a different ink to the effect that no warranty or representations have been made by P. H. Sumner or any one as to the value of said farm. Reynolds and wife admit their signature to this paper, but they have no recollection of having signed it, or of knowing the contents or effect of it; and it is manifest that at this time, and for a considerable period after-

wards, they had perfect confidence in Sumner, and would have signed anything he asked them."

It will be observed that at the time this contract was entered into with Arthur E. Sumner the title to the premises was not in him, but in his mother. On the 20th of February, 1889, Mr. and Mrs. Reynolds signed another agreement, in which they agreed to accept one-tenth of the surplus of the stock of a company to be formed after the stock to be put into the treasury of the company has been deducted in payment in full of the mortgage of $5,000 above stated. The contract does not state what the company was to be formed for, but the allegation and inference is that it was to be formed to develop the Long Island farm, to turn it into a cranberry farm. On the 26th of March, 1889, Mr. and Mrs. Sumner executed a deed to Reynolds and wife, in consideration of one dollar and other considerations, for the one-tenth part of the Long Island farm, "subject to a mortgage given to the Mutual Life Insurance Company of New York to secure the payment of $6,000 and interest, and also subject to certain judgments now on record in said county of Suffolk." That deed was acknowledged on the same day, and delivered, but, at the request of Sumner, was not recorded until the 21st of August, 1889, on which day a suit was commenced in the Supreme Court of New York for Suffolk County by Willis and wife, the original owners of the Long Island farm, against the three Sumners, praying that the conveyance from Willis to Arthur E. Sumner and from him to Emma A. Sumner might be set aside on the ground that it was procured by fraud. This suit was undoubtedly the reason for the recording of this deed and others now to be mentioned. Shortly before that date — August, 1889 — Sumner introduced Reynolds and wife to Bloss, and the result of that introduction was that on the 14th of August, 1889, Mr. and Mrs. Reynolds conveyed their one-tenth interest to Bloss; and Sumner and his wife having, on the 29th of July, 1889, by deed of that date, recorded August 23, 1889, conveyed seventeen-thirtieths of their interest to Bloss, Bloss now held two-thirds of the title to the Manor farm. As a consideration from Bloss to the Reynoldses for the conveyance by the Reynoldses to Bloss of the one-tenth interest in the Long Island farm, Bloss transferred to the Reynoldses 275 shares, par value of $10 each, of the Bay State Gravel Mining Company of Butte County, Cal., and 200 shares of the Queen Bee Gold Mining Company of Dakota, the par value of which is not stated. These shares were said to be worth $2 a share at the time. Bloss also transferred to him one other certificate of 25 shares of some kind of mining stock,

which Bloss took back as collateral security for $50 advanced to Capt. Reynolds, for which he took his note. The aggregate value of all the shares transferred, at the value placed upon them at the time, was only about $2,500. Sumner and wife and son answered the suit brought by Willis and wife against them, and set up that they had no further interest in it, because they had conveyed all their interest to Bloss. The complaint was amended by bringing in Bloss and Reynolds and wife. Bloss answered, denying the fraud, and claiming to be a *bona fide* purchaser for a valuable consideration without notice of the two-thirds conveyed to him, but does not set out in his answer what that consideration was. Reynolds and wife did not answer. The cause came on for trial before Judge Bartlett of the Supreme Court in the summer of 1890, both Bloss and Reynolds being present at the trial and being sworn as witnesses, and the court found as a matter of fact that the conveyance from Willis and wife to Arthur E. Sumner was absolute as to one-third, but as to the other one-third it was in trust, and that as a matter of fact the defendants Reynolds and wife received their title to one-tenth merely as a collateral security, and that at the suggestion of Sumner they transferred the title to Bloss, and that Bloss was not a purchaser for value, and that he held the title for and in the interest of Sumner. In the meantime Sumner and wife, on the 18th of December, 1889, assigned the Reynolds mortgage in question to Bloss by deed which stated a consideration of $5,000. That assignment was recorded on the 1st of February, 1890, and Bloss, on the 15th of March, 1890, assigned it to Abby M. Magie, the complainant herein, and that assignment was recorded on the 15th of April, 1890. No money was paid directly by Bloss to Sumner for the assignment from Mrs. Sumner to Bloss, and the evidence of Sumner and Bloss on the subject of the consideration is unsatisfactory. As to the assignment from Bloss to the complainant, however, the evidence shows that Bloss nominally, but Sumner really, who was the actual owner at that time, received a valuable consideration from Mrs. Magie for it. That consideration arose in this wise: Mrs. Magie is an aged lady, residing in Kansas City, Mo., and has no personal knowledge of any of these transactions. She is represented here by her daughter, a Mrs. Terhune, a very worthy lady, residing in Brooklyn, who had the misfortune to come into contact with this man Sumner. Mrs. Magie, the complainant, was the owner of a house and lot at Roselle, in Linden township, Union County, N. J., and on the 20th of November, 1889, conveyed that property to Benjamin G. Bloss by deed which, though dated in 1884, was not delivered or recorded until the

20th of November, 1889. It was in fact executed in 1884, with the names of the grantee left blank, and in November, 1889, Bloss' name was inserted in that blank. Sumner, who conducted the transaction, knew of this, and was willing to accept the deed under those circumstances. Bloss, on the 11th of November, and shortly before the deed from Mrs. Magie to him was lodged for record, executed a mortgage to Mrs. Magie upon the property so conveyed to him, to secure the payment of $4,250, part of the consideration money, in five years from date. Mrs. Terhune had become the owner, through the agency of Sumner, of a tract of land adjoining the Horn Tavern farm on Long Island upon which Mrs. Sumner held a mortgage of $1,000, and Sumner proposed to Mrs. Terhune that if she would cause her mother, Mrs. Magie, to assign to his wife the mortgage which she held against Bloss for $4,250 on the Roselle property he would procure Bloss to assign to her an interest in the Reynolds mortgage here in question, and would discharge the mortgage which Mrs. Sumner held upon Mrs. Terhune's property in Suffolk County; and that arrangement was made, Mrs. Magie, on the 11th of March, 1890, assigned to Mrs. Sumner the mortgage which she held against Bloss on the Roselle property, and Mrs. Sumner assigned to Mrs. Magie the mortgage on the latter's property on Long Island, and Bloss thereupon assigned to Mrs. Magie the mortgage here in question to the extent of the sum of $3,042.74, and Bloss guaranteed the payment of it to that extent to Mrs. Magie. Mrs. Sumner immediately released to Bloss the mortgage so assigned by her to Mrs. Magie, and took a new mortgage in its place, and subsequently procured the property at Roselle to be sold for taxes, and it was bought in by Mrs. Sumner. So that Mrs. Sumner at present holds the tax title to the Roselle property, and a mortgage upon it, and Mrs. Magie holds the title to the Reynolds mortgage to the extent of a little over $3,000. I should have observed that at the very time, to wit, December 31, 1888, when these transactions occurred between Reynolds and wife and Sumner, the mortgage held by the Mutual Life Insurance Company of New York on the Long Island farm had been foreclosed, proceeded to decree, and the property was actually advertised for sale by the sheriff; and afterwards (just when does not appear) the property was sold and bought by the company at a price less than enough to pay the mortgage; but the Mutual Life Company gave the parties who appeared to be interested the privilege of redeeming it by paying $5,000, and those parties at the hearing were admitted to be Mr. Perrin H. Sumner as to one-half, and an outside party, not connected with these transac-

tions, — one Whitlock, — as to the other part; thus confirming the finding of Judge Bartlett that Bloss never really had any interest whatever in that farm.

It abundantly appears that the shares of mining stock which Capt. Reynolds received were of no value whatever, and the evidence of Bloss and Sumner failed to satisfy me that any consideration was paid by Bloss to Sumner on the assignment of the mortgage. But whether any consideration passed between Bloss and Sumner is immaterial, since both swear that at the date of the transfer to Mrs. Magie Bloss, interest in it had ceased, and he held it for the benefit of Sumner or his wife. I am also satisfied that neither Capt. Reynolds nor his wife understood the nature or character of the contract of December 31, 1888, which they signed, and also that the subsequent transfer of the share in the Manor farm to Bloss was done at the instance and request of Sumner, and without any idea on their part that by so doing they were giving any additional strength to, or varying the character of the mortgage. It is further in proof that no demand was ever made by Sumner or his wife upon Capt. Reynolds for interest; that a formal demand was made by Bloss, but never followed up, and upon the assignment by Bloss to Mrs. Magie the bond and mortgage was retained by Bloss, and that he paid interest to Mrs. Magie on the portion of it which he did assign to her and finally, failing to pay, she took measures to get possession of the bond and mortgage itself, which she finally did, and brought this suit on the 17th of November, 1891, nearly three years after the mortgage was given, and more than two years after the first default in interest. Mrs. Magie made no inquiries of Capt. Reynolds or wife or any one in their interest as to the validity of this mortgage, and took it blindly upon the assurance of Sumner. In point of fact Mrs. Terhune applied to Sumner to sell her mother's house and lot to Roselle. Sumner found a purchaser in Bloss, though I doubt if Bloss was anything more than a figurehead for Sumner. He also induced her to purchase the property in Suffolk County, and his hand is visible throughout all the various transactions heretofore detailed. Without going through the details of the various interviews between Capt. Reynolds and wife and Sumner and Bloss, I am satisfied that the mortgage was procured by fraud, without any consideration, unless the shares of mining stock may be so held, and that Bloss' connection with the affair was entirely in the interest of Sumner, he lending himself to Sumner to aid him in defrauding Reynolds and wife, and that he never had any interest in the bond and mortgage; so that, if either Mrs. Sumner or Bloss

were complainants in the cause, the result would not be open to a moment's doubt.

The well-settled rule in this State, as well as in other equitable jurisdictions, is that an assignee of a bond and mortgage takes it subject to all the equitable defenses which the original obligors and mortgagors have thereto. This is so at law as well as in equity. It was so held at law in an action on a bond in Barrow *v.* Bispham, 11 N. J. Law, 110, after an elaborate consideration of the authorities. And the same doctrine was held in equity by Chancellor Vroom in Shannon *v.* Marselis, 1 N. J. Eq. 413. At page 424 the chancellor examines the authorities in England and New York, and quotes with approbation the language of Chancellor Kent in which he states that it is the duty of the assignee to make inquiries of the obligor or mortgagor or person owning the equity of redemption before taking an assignment of the bond and mortgage. And see the remarks of the lord chancellor in Matthews *v.* Wallwyne, 4 Ves. 118, at page 127. This ruling was followed in Jaques *v.* Esler, 4 N. J. Eq. 461, by Chancellor Haines and by Chancellor Green in Woodruff *v.* Depue, 14 N. J. Eq. 168, and by Chancellor Zabriskie in Conover *v.* Van Mater, 18 N. J. Eq. 481, and again by the same judge in Coursen *v.* Canfield, 21 N. J. Eq. 92, and has never been questioned or doubted, and finally has the approval of the court of errors and appeals in Atwater *v.* Underhill, 22 N. J. Eq. 599, at page 606. The principle underlying this rule is that the mortgage is a mere incident of the debt which it is intended to secure, and a defense to the debt is a defense to the mortgage. If the mortgage is given to secure a negotiable promissory note, and the note is negotiated for value in the ordinary way before maturity, the holder will hold it and the mortgage free from all defenses. 2 Jones Mortg., § 1487, and cases cited. But if the mortgage be given to secure a non-negotiable instrument, the assignee takes it subject to all defenses to the bond or other instrument manifesting the indebtedness. In this aspect the assignment of a mortgage, though it assume (as it usually does) the form of a conveyance of land, differs from an ordinary conveyance in which the grantor for value takes the title free from all prior conveyances and equities of which he has no actual or constructive notice. Carpenter *v.* Longan, 16 Wall. 271, at page 275; Matthews *v.* Wallwyne, 4 Ves. 118, at page 129; Coote Mortg., p. 301 *et seq.* A mortgagor and obligor may, however, so conduct himself as to mislead a proposed assignee, and estop himself from setting up his defense; and I have looked with care into this case to see if I could find anything in the conduct

of Mr. and Mrs. Reynolds which would estop them as against Mrs. Magie. It is true that Bloss swears that shortly before he took the assignment from Mrs. Sumner he talked with Mr. and Mrs. Reynolds about this mortgage, and they declared it was a good mortgage, and seemed anxious that he should take it, and advance the money upon it, and it is evident from his evidence, if truthful, that they at that time expected that, if Bloss did advance the money upon it, they would get it; and if he had done so, upon the hypothesis that his evidence is true, the mortgage would have been a valid security in his hands. But the fact is that I am not satisfied that Bloss ever advanced anything at all upon the mortgage to Sumner or his wife, and the undoubted fact is that if he did so he had been repaid all that he advanced prior to the date of the transfer to Mrs. Magie, because, as before remarked, Sumner or his wife were the undoubted owners of the mortgage at that time, and received from Mrs. Magie the consideration for its assignment. Bloss assigned it at their request, and for their benefit, and at that time claimed no interest in it. No interest was ever paid on the mortgage, nor is there any indorsement of interest upon it, so that the complainant was not misled by anything of that sort; and, as before observed, she made no inquiries with regard to it from either Reynolds or his wife or anybody representing them.

Two matters have been put forward as furnishing some ground for an estoppel. One is a contract entered into between a man by the name of Randall and Mr. and Mrs. Reynolds on the 10th of October, 1889, in which Reynolds and wife agreed to exchange with Randall 10,000 shares of stock in the Maywoos Brown Stone Quarrying Company (which had been organized for the purpose of developing the stone quarry) for a lot of land in Norwalk, Conn., owned by Randall, and in that contract there is a statement that the property of the quarrying company consisted of about sixteen acres of land underlaid with brown stone, "subject to a mortgage of $5,000, with interest at five per cent per annum." This clause in this contract is relied upon as a recognition by Reynolds and wife of this mortgage, but it does not appear that Mrs. Magie ever saw it, or in any wise relied upon it. Then, again, there is produced a deed dated the 20th of February, 1889, made very shortly after the execution of this mortgage, by Reynolds and wife to the stone quarrying company of a part of the mortgaged premises, said to contain about seventeen acres of land, and which was duly recorded, and in that deed is this clause: "Subject to one mortgage now on the said premises, given to secure the pay-

ment of $5,000 and interest thereon." This reference to a mortgage, like that in the contract to Randall, does not identify it, and it does not appear in this case either that Mrs. Magie or her agent ever saw or relied upon that deed in any way. The only fact which has at any time struck me as affording the least ground of estoppel is the forbearance of Reynolds and wife to take any steps to have this mortgage canceled and removed. It will be observed that it was made and executed on the 2d of January, 1889; that it was assigned by Sumner to Bloss on the 18th of December, 1889, and that this assignment was recorded on the 1st of February, 1890, and that it was assigned by Bloss to Mrs. Magie on the 15th of March, 1890. When asked upon the stand why they had allowed the matter to remain so long, Reynolds and wife said that they were at all times poor; that at first they had confidence in Sumner; then they began to lose confidence, and asked him to return the mortgage, and that he promised from time to time to do so, and that they relied upon his promises, and then that they consulted counsel in New York, who promised to do something for them, but was taken sick and died, and that in the meantime they were in hopes of managing to get the mortgage out of his hands by friendly negotiations, and that finally they put the matter into the hands of Mr. Campbell, their counsel in Hackensack, who, for some undisclosed reason, did nothing until the bill to foreclose was filed in this cause. But upon full consideration I have come to the conclusion that it was not the duty of Mr. and Mrs. Reynolds to commence suit to have this mortgage canceled, and that their not doing so forms no ground of estoppel. They had a right to rely upon the well-settled rule of law that the purchaser of a chose in action of this character takes it subject to all equities, and that he has the power to protect himself by making inquiries at the proper sources; and therefore they are entitled to a decree that the complainant's bill be dismissed as to them, and that they are entitled to have the bond and mortgage delivered up to be canceled.

This result renders it unnecessary to determine the question arising as against Mrs. Day, who, in the summer of 1889, purchased a small piece of this farm from Mr. and Mrs. Reynolds, and entered into immediate possession of it. Reynolds procured from Sumner a release of this lot which he handed to Mrs. Day, with her deed. It was executed before the assignment from Sumner and wife to Bloss. Mrs. Day, however, failed to get it recorded until this bill was filed. I am referred on this part of the case to the act of February 25, 1880 (P. L., p. 53); Supp. Revision, p. 134, §§ 14–16. The third

section of that act provides "that when any such release, or deed intended to operate as a release, made and executed after this act shall take effect, is not recorded, or when in such release or deed the intention to operate as a release shall not be plainly manifest, as in the act provided, any payment made in good faith and without actual notice of such release or deed, to the holder of any mortgage or judgment, from the lien and effect of which any lands may be thereby released, and any assignment of such mortgage or judgment, or of any interest therein, to any person not having actual notice of such release or deed, shall be as valid and effectual as if said release or deed had not been made; and any lands released from the lien and effect of any mortgage or judgment by any such release or deed not recorded shall be bound by any proceedings and sale under and by virtue of such mortgage or judgment as if the said lands had not been released from the lien and effect thereof." If I had come to a different conclusion as to the validity of the mortgage in complainant's hands, the act would have given rise to a serious question. But the statute clearly deals with a valid mortgage upon which something is due, and cannot be used to give life to a mortgage upon which nothing is due by investing the assignee with the protection of the position of a *bona fide* purchaser of land for value.

It was further urged that the brown stone quarrying company is not in a situation to take advantage of the defense set up by Reynolds and wife. As a part of the plan for developing the brown stone quarry, a company which had been previously organized by Capt. Reynolds for that purpose was given life by the election of officers, etc., of which Mr. Reynolds was one and Sumner was another and a friend of Sumner was a third, and a conveyance made as above stated, to this corporation of a portion of the mortgaged premises. That deed was dated the 20th of February, 1889, and is without any consideration mentioned in it whatever, and contained the clause hereinbefore recited. It does not identify the mortgage, and it does not declare that the amount due on the mortgage is taken as part of the consideration money, and the proof fails to show any arrangement to that effect. At that time Reynolds owned the whole stock, except a few shares transferred to Sumner for aiding in its organization. The conveyance was made without any consideration in fact, was so understood at the time, and there could be, of course, no understanding at the time that the amount of $5,000, mentioned in the mortgage, was taken as a part of the consideration money, or that that amount was to be paid by the quarry company. As

the conveyance was for only a portion of the land covered by the mortgage, and the presumption, in the absence of any facts or expression showing a contrary intent, would be that the understanding between the parties was that the mortgaged premises were to bear the burden of the mortgage in the inverse order of their conveyance, and that the portion of the premises not included in the conveyance to the quarry company should be sold first to pay the mortgage. Gray *v.* Hattersley (N. J. Ch.), 24 Alt. Rep. 721. And I think that the reference to the mortgage in the deed does not have the effect of casting the burden of it upon the premises conveyed, but may be accounted for by the fact that the conveyance contains full covenants of seisin and warranty. No doubt the object of its insertion in the deed, which is in the handwriting of Sumner, was to fortify his position as holder of the mortgage. But the question here does not arise between the grantor and grantee of a part of the mortgaged premises as to which part shall bear the burden of the mortgage, — a question in which the mortgagee or his assignee is usually not interested — but it arises between the grantee of a part of the mortgaged premises and the holder of the mortgage, and is essentially a different question from the other. No doubt, if a grantee of a portion of premises subject to a mortgage assumes the payment of a certain sum — the whole or a part of the sum due on the mortgage — such assumption being in payment, in whole or in part, as the case may be, of the purchase price which he agrees to pay his grantor, such purchaser is ordinarily estopped from setting up any defense against the mortgage so assumed, and the reason is that he has the money in his hands to pay it. I say "ordinarily," because it seems to me that this general rule must be subject to a notable exception. The assumption is a matter of convention between the grantor and grantee, and the right to enforce it rests primarily in the former, and where it has been enforced in favor of the holder of the mortgage it has been done upon the principle that the holder of the mortgage is subrogated to the rights of the grantor in that behalf. In the case in hand, if the complainant's mortgage received additional validity by reason of the conveyance by the mortgagors, Reynolds and wife, to the quarry company, such addition comes to it through subrogation to the right of the mortgagors under their contract with the quarry company. In order to derive a benefit from that transaction, the holder of the mortgage cannot thrust upon the mortgagors and grantors the benefit of a right which they do not and never did claim. The mode in which the mortgagor and grantor

in such cases is benefited is by having the whole or a part of the purchase money devoted to the payment of his debt, and the relief of his other property from the lien of the mortgage; and if, before any payment is made by the grantor to the holder of the mortgage, the grantor and mortgagor himself is forced to pay it, or does it voluntarily, as he may well do, a right would at once arise to him to call on the grantee to pay to him the amount instead of to the holder of the mortgage. In so doing he would be demanding only what was originally his own. It seems to me to follow that if, before any payment by the grantee to the holder of the mortgage, the grantor discovers that neither he nor his land is liable to pay anything whatever to the holder of the mortgage, he may rescind his contract with the grantee, and countermand, so to speak, his direction to him to make payment to the holder of the mortgage, and release him from his obligation in that behalf. This view is not, as I think, in conflict with the decisions upon this topic. Horton *v.* Davis, 26 N. Y. 495; Freeman *v.* Auld, 44 N. Y. 50; Ritter *v.* Phillips, 53 N. Y. 583; Crowell *v.* Hospital, 27 N. J. Eq. 650; Brolasky *v.* Miller, 9 N. J. Eq. 807; Van Winkle *v.* Earl, 26 N. J. Eq. 242.

The quarry company did not answer the complainant's bill, but no decree has been entered against it. Upon the whole case I am of the opinion that the mortgage is not a valid lien upon any of the property, and that it must be delivered up to be canceled.

The assignment from Bloss to the complainant contains a guaranty by Bloss that the amount of $3,942.74 is due and owing upon the mortgage, in these words: "I do hereby covenant and agree to and with the party of the second part that there is now due," etc., "and I do for myself, my heirs, executors, administrators, and assigns, guaranty the payment of the said bond and mortgage." That guaranty is set out in the bill. And in addition to the ordinary prayer found in a foreclosure bill, there is a prayer for further and other relief. The prayer for foreclosure is in these words: "And that the said defandants, or some one of them, may be decreed to pay to your oratrix the said principal sums so due to her on the said bond or obligations and deed of mortgage hereinbefore mentioned and set forth, and all the interest money now due and to grow due thereon, together with all your oratrix's costs and charges in this behalf sustained, by a short day, to be appointed and in default," etc. It was contended by the counsel for complainant that this prayer was sufficient to entitle the complainant to a decree against Bloss, but, if the court should be of the opinion that it was not suffi-

cient he moved that he might be permitted to amend, and such a motion was made in the presence and with the consent of the counsel of Bloss. I think that it will be in accordance with good pleading that there should be an amendment containing a special prayer for payment by Bloss, and, after such prayer has been inserted, the complainant may have a decree for payment by Bloss, and a reference to a master to ascertain the amount due if the parties cannot agree. The defendants Reynolds and wife are entitled to costs against the complainant. There will be no costs in favor of Day and wife, because they failed to put their release on record. Complainant is entitled to costs against Bloss, to include the costs of Reynolds and wife.

When Mortgagor's Assignee is Liable Personally for Mortgage Debt.

Equitable Life Assurance Society of the United States *v.* Bostwick et al., 100 N. Y. 628.

Opinion of the court. "This action was brought to foreclose a mortgage executed to the plaintiff by one W. P., the then owner of the premises. Through several mesne conveyances the title vested in Emma L. Bostwick, who assumed payment of the mortgage as part of the consideration for which the deed to her was made. The debt was not paid, and the plaintiff had judgment of foreclosure, and for the payment by her of such deficiency as might remain after application of the proceeds of the sale. The propriety of the proceedings so far is not questioned, but when Donovan was made a party as having an interest in the premises subsequent to the mortgage, and Mrs. Bostwick and Josephus, her husband, by their answer to the complaint, set out a variety of circumstances as creating a liability on the part of Donovan to pay the deficiency, and asked that the plaintiff first exhaust its legal remedy against him. Donovan by answer put in issue these allegations, and the decision having been in his favor, Mrs. Bostwick and her husband appeal therefrom. We find no ground on which it can succeed. *First.* So far as it rests upon the assumption by the appellant's counsel that they have paid the deficiency judgment, it must fail, for there is neither finding by the court, nor evidence, however slight, that such is the fact. *Second.* Donovan was properly made a party to the action, because he was in possession of the premises affected by the foreclosure, and if as to the appellants he had, by assuming payment of the mortgage debt, become principal debtor, it may be that the plaintiff

would have been bound upon request to proceed against him in that capacity (Cosgrove *v.* Tallman, 67 N. Y. 95). But the difficulty with the appellants' case, and a complete answer among others to this appeal is that there is no evidence that such relations existed. The agreement of April 1, 1878, was between Donovan and Mr. Bostwick; under it the latter was to give a title to the mortgaged premises, and the former was to pay therefor in part by assuming the mortgage. Bostwick has conveyed no title, nor had he any to convey. It was in Mrs. Bostwick, and she was not a party to the agreement. The learned counsel for the appellants contends that the deed of April 15, 1878, from Mrs. Bostwick and her husband, is not valid. It is therefore unnecessary to consider that question. If, however, it be valid, it contains no assumption of the mortgage debt or agreement to pay it, and such obligation cannot be implied from the statement that the conveyance is subject to the mortgage and that the amount thereof forms "part of the consideration, and is deducted therefrom." (Belmont *v.* Coman, 22 N. Y. 438.) *Third.* Some other points are made by the appellants that the deed should be reformed; "that under any circumstances Donovan should pay as much interest as accrued before the appointment of a receiver." I find no allusion to either matter in this case, and whether the appellants have rights which by any mode of proceeding may be enforced, cannot be answered upon the record now before us. Upon that the judgment is right and should be affirmed.

Liability of Mortgagor or Assignee, Where He Assumes Payment of Mortgage Debt.

Union Mutual Life Insurance Company *v.* Hanford, 143 U. S. 187.

Appeal from the circuit court of the United States for the northern district of Illinois. Affirmed.

Statement by Mr. Justice Gray.

This was a bill in equity, filed March 30, 1878, by the Union Mutual Life Insurance Company, a corporation of Maine, against Philander C. Hanford, Orrin P. Chase, Frederick L. Fake, and Lucy D. Fake, his wife, citizens of Illinois, to foreclose by sale a mortgage of land in Chicago, and to obtain a decree for any balance due the plaintiff above the proceeds of the sale. Fake and wife were defaulted, and Hanford and Chase answered. The case was heard upon a master's report, and the evidence

taken before him, by which (so far as is material to be stated) it appeared to be as follows: —

On September 9, 1870, Hanford and Chase mortgaged the land to one Schureman to secure the payment of three promissory notes of that date, signed by them, and payable to his order, one for $5,000, in one year, and the second for $5,000, in two years, each with interest at the rate of 8 per cent annually, and the third for $6,000, in three years, with interest at the rate of 10 per cent annually.

On January 30, 1871 (the first note having been paid), the plaintiff, through one Boone, its financial agent, bought the mortgage, and Schureman indorsed the remaining notes, and assigned the mortgage to the plaintiff.

On September 9, 1872, Hanford and Chase conveyed the land to Mrs. Fake by deed of warranty, "with the exception of and subject to" the mortgage describing it), "which said mortgage or trust-deed, and the notes for which the same is collateral security" (describing them), "it is hereby expressly agreed shall be assumed, and paid by the party of the second part, and, when paid, are to be delivered, fully canceled, to said Chase and Hanford."

At or about the date of this conveyance, Chase called with Fake at Boone's office, and told him that Hanford and Chase had sold the property to Mrs. Fake, and that she was to pay the mortgage, and Boone, as Chase testified, "said 'All right,' or something of that sort." At the same interview, Boone, as the plaintiff's agent, in consideration of $150 paid him by Chase, extended the $5,000 note until September 9, 1874.

Fake, as his wife's agent, afterwards paid interest on the notes to Boone, as the plaintiff's agent; and on January 9, 1875, for the sum of $340, obtained from him, without the knowledge of Hanford or Chase, an extension of the notes until September 9, 1875.

The value of the mortgaged premises in September, 1874, was $18,000 to $19,000, and at the date of the master's report, in April, 1879, was $10,000 to $15,000 only.

The principal defense relied on by Hanford and Chase was that they were discharged from personal liability on the notes by this extension of the time of payment without their consent.

The land was sold by the master, under order of the court, for $12,000, which was insufficient to satisfy the sums due on the mortgage; and the plaintiff, after notice to Hanford and Chase, moved for a deficiency decree for a sum amounting, with interest, to more than $5,000. The circuit court overruled the motion. 27 Fed. Rep. 588. The plaintiff appealed to this court

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

Few things have been the subject of more difference of opinion and the conflict of decision than the nature and extent of the right of a mortgagee of real estate against a subsequent grantee, who by the terms of the conveyance to him agrees to assume and pay the mortgage.

All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal, and the grantor is the surety, for the payment of the mortgage debt. The chief diversity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

By the settled law of this court, the grantee is not directly liable to the mortgagee at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. Keller *v.* Ashford, 133 U. S. 610; 10 Sup. Ct. Rep. 494; Willard *v.* Wood, 135 U. S. 309; 10 Sup. Ct. Rep. 831. In that view of the law there might be difficulties in the way of holding that a person who was under no direct liability to the mortgagee was his principal debtor, and that the only person who was directly liable to him was chargeable as a surety only, and consequently that the mortgagee, by giving time to the person not directly and primarily liable to him, would discharge the only person who was thus liable. Shepherd *v.* May, 115 U. S. 505, 511; 6 Sup. Ct. Rep. 119; Kelleher *v.* Ashford, 113 U. S. 610, 625; 10 Sup. Ct. Rep. 494. But the case at bar does not present itself in that aspect.

The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is, as was adjudged in Willard *v.* Wood, above cited, to be determined by the law of the place where the suit is brought. By the law of Illinois, where the present action was brought, as by the law of New York, and of some other States, the mortgagee may sue at law a grantee who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. Dean *v.* Walker, 107 Ill. 540, 545, 550; Thompson *v.* Dearborn, *Id.* 87, 91; Bay *v.* Williams, 112 Ill. 91; Burr *v.* Beers, 24 N. Y. 178; Thorpe *v.* Coal Co., 48 N. Y. 253. According to that view, the grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee

for the debt which the mortgagor was already liable to the latter; and the relation of the grantee and the grantor towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. Where such is held to be the relation of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt. Calvo *v.* Davies, 73 N. Y. 211; Bank *v.* Estate of Waterman, 133 Ill. 461, 467; 29 N. E. Rep. 503.

The case is thus brought within the well-settled and familiar rule that if a creditor by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety; because the creditor by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract; and it is for the surety alone to judge whether his position is altered for the worse. 1 Spence Eq. Jur. 638; Samuell *v.* Howarth, 3 Mer. 272; Miller *v.* Stewart, 9 Wheat. 680, 703. The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract (Ewin *v.* Lancaster, 6 Best & S. 571; Financial Corp *v.* Overend, L. R. 7 Ch. App. 142, and L. R. 7 H. L. 348; Wheat *v.* Kendall, 6 N. H. 504; Guild *v.* Butler, 127 Mass. 386); or even if that relation had been created since that time (Oakley *v.* Pasheller, 4 Clark & F. 207, 233; 10 Bligh N. S. 548, 590; Colgrove *v.* Tallman, 67 N. Y. 95; Smith *v.* Shelden, 35 Mich. 42).

In the case at bar, the mortgagee, immediately after the absolute conveyance by the mortgagors, was informed of and assented to that conveyance and the agreement of the grantee to pay the mortgage debt, and afterwards received interest on the debt from the grantee; and the subsequent agreement by which the mortgagee, in consideration of the payment of a sum of money by the grantee, extended the time of payment of the debt, was made without the knowledge or assent of the mortgagors. Under the law of Illinois, which governs this case, the mortgagors were thereby discharged from all personal liability on the notes, and the circuit court rightly refused to enter a deficiency decree against them.

Decree affirmed.

Effect of Oral Assignment — Tender of Payment to Mortgagee.

Kennedy *v.* Moore, 91 Iowa, 39; 58 N. W. 1066.

GIVEN, J. 1. Plaintiff asks to recover upon a note and mortgage executed by defendants J. J. and Lucy J. Moore to George W. Severance, which note is payable to order, and which plaintiff alleges was orally transferred to him for value by said Severance, and that he is the owner thereof. Defendants answer, admitting the execution of the note and mortgage, and for want of knowledge or information deny that said note and mortgage are the property of the plaintiff. In the fourth paragraph they allege that they were notified by Isaac Struble that he, as attorney for plaintiff, held said note and mortgage; that there was then due thereon $1,618.70, and demanded payment thereof; that on said day and before the commencement of this action, they tendered said amount to said Struble "and demanded of him the possession of said note and mortgage, and also demanded of him that he show his authority to collect and receive the amount due thereon, either by producing an assignment of the said note and mortgage from the said George W. Severance, or by producing and delivering to these defendants a release of said mortgage, duly executed by said Severance;" that said Struble offered to accept the money, and to deliver the note and mortgage, "but refused to produce either an assignment of the said note and mortgage from said Severance to said Kennedy or any other person, or to produce or deliver to these defendants a release of said mortgage executed by said Severance; and stated as his reason for refusing to produce the said assignment or deliver the said release that the said Severance had refused to execute the said papers, or either of them." Defendants further allege in said fourth paragraph that prior to said demand George W. Severance had notified them that the plaintiff was not entitled to said note or mortgage, or to collect the amount due thereon and that because of said notice they declined to pay said note unless assigned, or a release from Severance was delivered. In subsequent paragraphs defendants allege a readiness to pay said sum of $1,618.70; "that, as these defendants have been informed and believe, the said George W. Severance claims to be the owner of said note and mortgage, or of some interest therein, and claims that the plaintiff in this action is not entitled to receive payment thereof, and the said Severance refuses to release the said mortgage of record, * * * or to authorize any other person to release the same." For the reasons stated in their answer, defend-

ants moved that Severance be made a defendant, which motion was overruled. Plaintiff demurred to fourth paragraph of the answer "on the ground that the same does not entitle the defendants to the relief demanded." This demurrer was sustained, and the defendants elected to stand on their answer, and refused to plead further, and the court ordered that defendants be granted a certificate for appeal to the Supreme Court of Iowa, and then and there certified to the following questions of law for the decision of the Supreme Court." The first question certified is whether, under the facts as alleged in the pleadings, the motion to make Severance a party should have been sustained. The second question is: "Does the condition annexed to the tender as pleaded in said answer vitiate the tender, and leave the defendants liable to interest and costs in this action, in the manner as though the tender had not been made?"

2. After defendants' motion was overruled, plaintiff's demurrer sustained, and the certificate granted, plaintiff proceeded to prove up his case by introducing the note and mortgage, and calling Mr. Rishel, who testified that they were delivered to him by Severance, for plaintiff, in an adjustment of some indebtedness from Severance to Kennedy. On cross-examination he answered that there was never any written assignment that he knew of. Appellee contends that by this cross-examination appellants waived any error that may have been committed in the rulings on the motion and demurrer, and therefore are not entitled to be heard in this court. After these rulings, the only issue remaining was as to plaintiff's ownership of the note and mortgage, and to establish his ownership appellee called Mr. Rishel. Appellants did not examine as to that issue, but only as to a fact alleged in both the petition and answer, namely, that there was no written assignment. Whether appellants would have waived their exceptions by appearing and defending upon the issue of ownership, we need not determine, as it does not appear that they offered any defense on that issue, but rest their defense solely upon their tender. The ownership of the note and mortgage did not depend upon there being an assignment thereof in writing. The claim is that, in the absence of such an assignment, appellants were warranted in making their tender upon the conditions they did. We think appellants are entitled to be heard on the questions certified.

3. Plaintiff was demanding payment to him of a note payable "to the order of George W. Severance," and secured by mortgage upon an alleged oral assignment thereof. Defendants offered to pay upon surrender of the note and mortgage if

assigned in writing by Severance, or on delivery of a release of the mortgages from Severance. This plaintiff failed to do, for the reason that Severance refused "to execute the said papers, or either of them." Severance had notified defendants that the plaintiff was not entitled to said note and mortgage, or to collect the amount due thereon. While it is not directly stated that Severance had any interest in the note and mortgage, the allegations can lead to no other conclusion. The note was payable to his order. He had made no written assignment. There is no pretense of any other assignment than the oral assignment from Severance to plaintiff, and Severance was denying plaintiff's right to the note and mortgage. Surely there is a plain contention between Severance and plaintiff as to the ownership of the note that the defendants had a right to have determined. That Severance was claiming some interest in the note and mortgage is as apparent from the pleadings as if it had been stated in the most direct words. We think the motion of the defendants to make George W. Severance a defendant should have been sustained.

4. The fourth paragraph of the answer alleges a tender, and the question raised by the demurrer is as to sufficiency of that tender as alleged. The law is that, to be valid, a tender must be without other condition than that the party to whom it is made will do that which it is his legal obligation to do. Saunders *v.* Frost, 5 Pick. 250; Loughborough *v.* McNevin (Cal.), 14 Pac. 370; 15 Pac. 773; Cass *v.* Higenbotam, 100 N. Y. 248; 3 N. E. 189. In Johnson *v.* Cranage, 45 Mich. 14; 7 N. W. 188, the court says: "A tender may very properly be coupled with conditions such as the party has the right to make and is entitled to as resulting from a payment or tender legally made." The conditions upon which the tender was made were that Mr. Struble would deliver the note and mortgage to the defendants, and that he either produce an assignment thereof from George W. Severance, or produce and deliver to the defendants a release of said mortgage, duly executed by said Severance. True, it is said that defendants demanded that Mr. Struble show his authority to collect and receive the money, not generally, but by producing the assignment or release from Mr. Severance. This brings us to inquire whether these were conditions which the plaintiff was under legal obligation to perform, and to which defendants were entitled on making payment or tender. There is no question as to their right to a surrender of the note and mortgage, and the allegation is that Mr. Struble offered to accept the money and deliver the note and mortgage, but refused to produce an assignment or release from Severance. This note was payable to the

order of George W. Severance. He had given no order in writing, by assignment or otherwise, for its payment to the plaintiff, but, on the contrary, had notified the defendants that the plaintiff was not entitled to said note and mortgage, or to collect the same. Until satisfied of record, the mortgage would stand as a cloud upon defendants' title to their land, even though the note were fully paid. It seems to us that, under these circumstances, the plaintiff was under legal obligation to procure either an assignment of the note or a release of the mortgage from Mr. Severance; and that defendants had the right to make their offer of payment upon condition that plaintiff show his right to receive the same by producing an assignment or release. Surely, the defendants should not be required to assume the hazards of disputes between the plaintiff and Severance, nor to assume that either of them would release the mortgage after payment. It is argued that defendants must rely on section 4563, McClain's Code, which requires that upon payment the mortgagee, or those legally acting for him, must satisfy the mortgage of record, under a penalty of $25. It may be true, as contended, on the authority of Low *v.* Fox, 56 Iowa, 221; 9 N. W. 131, that Severance alone could release this mortgage. All the more reason, we think, why defendants had a right to demand as a condition of payment his assignment or release. They were not bound to take the hazards of any disputes between Severance and the plaintiff as to plaintiff's right to receive payment. We think the demurrer should have been overruled.

5. Appellee questions the sufficiency of the assignment of errors. We have examined them in the light of the authorities cited, and conclude that they are sufficiently specific. Our conclusions are that the first question certified must be answered in the affirmative, and the second in the negative. Reversed.

Payment to Mortgagee When Binding on Assignee.

Mulcahy *v.* Fenwick, 161 Mass. 164; 36 N. E. 689.

Report from supreme judicial court, Suffolk County; J. B. Richardson, Judge.

Bill by Bridget Mulcahy and another against Joseph B. Fenwick and others to compel defendants to discharge a mortgage and to surrender a note. The case was reported to the supreme court. Decree for defendants.

At the hearing in the superior court, Richardson, J., found the following facts: "In or about the year 1885 the plaintiff, Mrs.

Mulcahy, became the owner, in her own right, of a parcel of land, with the buildings thereon, situated in the city of Chelsea. Her husband, Daniel Mulcahy, transacted all the business relating to the said estate for her; she signing all deeds and documents, whenever it was necessary (not being able to read or write), by making her mark. About December 1, 1888, when the plaintiffs were erecting a house on said land, one Eben Hutchinson, an attorney at law, and judge of the police court of Chelsea, went upon said premises, and asked Mr. Mulcahy if he desired to borrow some money. Mr. Mulcahy replied that he might want some money in a few days. Shortly after, Mulcahy called at Hutchinson's office, in Chelsea; and the result of the interview between Mulcahy and Hutchinson was that Hutchinson agreed to loan the plaintiffs $1,100 in money, and also to assume and pay a mortgage of $1,700 held by Messrs. Slade & Griffin upon said estate of the plaintiffs, and Mulcahy agreed that the plaintiffs would give Hutchinson a note for the $2,800 secured by a mortgage on said estate. In pursuance of this agreement, on or near the 7th day of December, 1888, the said Hutchinson loaned the plaintiffs, in cash, the sum of $1,100, paying the same in several sums at different times, the first sum being paid on December 7, 1888, and later the said Hutchinson paid and discharged the said Slade & Griffin mortgage, of $1,700; and on the 7th day of December, 1888, the plaintiffs signed a note for $2,800, and executed a mortgage upon the aforesaid land in Chelsea for a like sum, as security for said note, and gave the note and mortgage to said Hutchinson. Said note and mortgage were made to run from the plaintiffs to one Henry Hunt Letteney. Said Henry Hunt Letteney executed an assignment of said mortgage and note on December 8, 1886, to Joseph B. Fenwick, one of the defendants. The terms and conditions upon which the money was loaned were fixed by said Hutchinson and Mulcahy, and without the knowledge of said Fenwick, excepting that said Fenwick had asked said Hutchinson to get a mortgage of $2,800 for him and had been told by said Hutchinson that he had a mortgage, or would get one for him. The note and mortgage deed were drawn by said Hutchinson, or one of his clerks at his office, and were executed by the plaintiffs at his office, and left there with Hutchinson; and the mortgage was taken to the Suffolk registry of deeds by said Hutchinson and recorded on December 8, 1888, and the assignment was taken to said registry by said Hutchinson and recorded on December 13, 1888. Said mortgage and assignment were taken from the registry by said Hutchinson about ten days after each had been left there to be

recorded, and the mortgage and assignment, together with the note and insurance policy, were delivered by said Hutchinson to Fenwick at Fenwick's house, in Chelsea. The sum of $2,800 was given by said Fenwick to said Hutchinson at about that time. Eleven hundred dollars, which was the money part of the consideration, was paid to said Mulcahy by said Hutchinson, in three different sums, at different times; the first sum being paid on December 7, 1888, at Hutchinson's office. Since the delivery of said mortgage, note, assignment, and policy to said Fenwick by said Hutchinson, as aforesaid, the same have ever since remained in the possession of the said Fenwick, either at his home or in his safe-deposit vault; and neither of said papers, since they were delivered by said Hutchinson to said Fenwick, have ever been in the possession of said Hutchinson, but have remained exclusively in the possession of said Fenwick. Hutchinson was the only party the plaintiffs believed to have any interest in the note. The plaintiffs never had any talk with said Letteney until after the said Hutchinson had absconded, and the plaintiffs never had any conversation with said Fenwick until about July, 1892, when said Fenwick, for the first time, stated to them that he held a mortgage upon their said premises. Said Mulcahy paid to Hutchinson the interest on said note of $2,800 from time to time, and also the principal sum in installments, and received therefor receipts, copies of which are hereto attached, marked 'A,' 'B,' 'C,' 'D,' 'E,' 'F,' and 'G,' the signatures to the said receipts being in the handwriting of said Eben Hutchinson; there being included in one or two of said receipts interest on a further loan of $100, made in January, 1889, by said Hutchinson to the plaintiffs, which loan the plaintiffs afterwards paid to said Hutchinson in full; the said $100 loan, however, being in no way connected with the said note and mortgage for $2,800. At the times when Mulcahy made said payments to Hutchinson, he saw Hutchinson have a note with the figures '$2,800' in the left-hand corner, and his signature at the bottom; and said Hutchinson appeared to write on the back of the note, same time saying to Mulcahy: 'You don't need a receipt. This indorsement will answer.' Said Fenwick received from said Hutchinson the sums of money indorsed on the back of said $2,800 note held by Fenwick, and received no more moneys from any source on account of said note. The indorsements on the back of this note held by Fenwick are all in his handwriting. These indorsements of interest were made by said Fenwick on or about the dates when the various sums of interest were paid to him by said Hutchinson. If the statements of said Hutchin-

son to Fenwick are admissible in evidence, it is shown and admitted that he stated to said Fenwick, at the time that he made the first payment of interest, that he (Hutchinson) was having other money transactions with said Mulcahy, that said Mulcahy was indebted to him on other matters, and that he (Hutchinson) would see that said Fenwick received his interest. No talk ever took place between said Fenwick and said Hutchinson in regard to payments of any part of the principal. Mulcahy paid the principal, in various installments, to said Hutchinson, as appears from the said receipts; the last being March, 1891. Said Henry Hunt Letteney, to whom the mortgage and note were made payable, was a clerk or scrivener in the said Hutchinson's office, and had no pecuniary interest whatever in said note and mortgage, and no part of the consideration came from him or through his hands; and he simply allowed his name to be used at said Hutchinson's request, as he was accustomed to do. It did not appear that said Fenwick ever had any conversation with said Hutchinson relating to the use of said Letteney's name, or in fact knew why it was so used, or made any inquiries of said Hutchinson in regard to the name. Said Fenwick never, in express terms, authorized said Letteney or said Hutchinson to collect any part of the principal; and the said Mulcahy never had any conversation with the said Hutchinson or the said Letteney as to why the mortgage was made to run to said Letteney, instead of to said Hutchinson. In July, 1892, Joseph B. Fenwick, the defendant, called at the plaintiff's house, and informed them that he held a mortgage for $2,800 on their estate aforesaid. That was the first notice that the plaintiffs had that Fenwick, or any one except Hutchinson ever had an interest in the note and mortgage, although Fenwick and Mulcahy both lived in Chelsea, and Fenwick knew where Mulcahy lived. It was the first actual notice that the plaintiffs had received that said mortgage had been assigned. When said note for $2,800 was delivered to Fenwick by Hutchinson, it was not indorsed, and remained unindorsed until after its maturity, to wit, in January, 1892, the defendant Joseph B. Fenwick supposing that he had a good title to the note. After the maturity of the note, he took it to said Letteney, and requested him to indorse it, which he did, writing upon the back of the note these words: 'Pay to Joseph Fenwick without recourse. Henry Hunt Letteney.' Said Letteney made no objection to indorsing said note, and did so without consideration, when requested by said Fenwick to do so. Said Letteney testified, and I find, that the reason why he did not indorse said note before its maturity was because he was not requested by

said Hutchinson to do so. Said Fenwick got the indorsement of said Letteney at the suggestion of a business acquaintance. Both Fenwick and Mulcahy had had separate previous dealings with said Hutchinson relating to real estate on several occasions. On two such occasions, Hutchinson placed $1,500 for Fenwick on a mortgage of real estate, and in so doing received, from Fenwick, Fenwick's check for $1,500, payable to Hutchinson. On October 1, 1888, Fenwick conveyed real estate to one Elizabeth B. Cutter, through Letteney, who acted simply as conduit of title, and as Hutchinson's clerk, and at Hutchinson's request, Hutchinson being the agent or adviser or counsel of Fenwick for the purpose of completing the transaction, but none of these transactions had anything to do with the subject in controversy. The assignment from Letteney to Fenwick was taken by Fenwick without question; the said Fenwick having confidence in said Hutchinson on account of his official and professional standing, and his high reputation in the community. The said assignment was drawn in Hutchinson's office, executed there by said Letteney at Hutchinson's request, and in Hutchinson's presence. The defendant, Joseph B. Fenwick, however, was not present when said Letteney executed said assignment, and never had any conversation concerning the same until he asked him (Letteney) to indorse the note, in January, 1892, as aforesaid. Letteney had no interest in said assignment, received no part of the consideration for it, and none of it passed through his hands; Letteney simply acting as clerk or scrivener for said Hutchinson, at Hutchinson's request. Said Mulcahy gave said mortgage to Letteney because Hutchinson presented it to him for his signature; and Fenwick received the mortgage from Letteney because it was assigned to him, and without inquiry. The defendant, Mrs. Fenwick, took an assignment from her husband, Joseph B. Fenwick, the defendant, of the mortgage and note, in the usual form, about August 1, 1892, without consideration, and through a third party named McVey. About August 1, 1892, the plaintiffs requested the defendants to execute a discharge of the mortgage, and to surrender the note, and they refused to do so. Upon the above facts and evidence, I reserve the case for the consideration of the supreme judicial court, in banc."

Barker, J. The case is reserved by a justice of the superior court upon facts found and reported by him, but without any determination or adjudication of the rights of the parties. The question whether Hutchinson was the agent of Fenwick, and as such agent received and collected from the plaintiffs the principal and interest of the mortgage, is one raised by the pleadings, and upon it the plaintiff has the burden of proof. The facts

reported are as consistent with the theory that, in making the payments which he made to Fenwick, Hutchinson was acting for the plaintiffs or for himself alone, as that he was an agent of Fenwick. The plaintiffs must therefore be held to have failed to prove that the payments to Hutchinson were in effect payments to Fenwick. Upon the facts reported, the plaintiffs must be held to have made the payments to Hutchinson at their own risk. They had given a note and mortgage to one Letteney, who was a clerk in Hutchinson's office, and they assumed that Hutchinson was the real party in interest, and made their payments to him accordingly. The note was payable to Letteney or order in three years from its date, and on the day after its date the note and mortgage were sold for value to Fenwick, and delivered to him, and thereafter kept in his possession. The assignment of the mortgage to him purported also to assign, transfer, and set over to him the note and claim thereby secured; but the note was not indorsed by Letteney until January, 1892, after maturity. The payments of principal were made to Hutchinson on June 19, 1890, November 7, 1890, and March 17, 1891. The plaintiffs had no actual notice of Fenwick's ownership of the note and mortgage, and he gave them no notice that he was in any way interested in the matter. As Hutchinson was not the payee of the note, he had no apparent right to receive payment upon it; and, in paying to him, the plaintiffs acted at their own risk, and must bear the loss. If the note had been non-negotiable, instead of negotiable, and not indorsed by the payee, the result must have been the same. The plaintiffs undertook, by the terms of the mortgage, to pay the debt to Letteney "or his executors, administrators, or assigns," and, by the note, to pay it to Letteney "or order;" and they have voluntarily chosen to pay to Hutchinson, who had no right, either from Letteney or the real owner, to receive payment. They are in the position neither of the maker of a negotiable note who has paid it in due course of business to a holder who produced it in support of his authority to receive payment, nor of a mortgagor who has paid to his mortgagee, having no knowledge that he has parted with his mortgage.

The plaintiffs contend that Letteney could not maintain an action against them upon the note, because it was not delivered to him, and he paid no consideration for it; but the facts reported show that full consideration moved to the plaintiffs for the note, and that they delivered both note and mortgage as operative instruments. The written assignment made Fenwick the owner of the note, although it was not indorsed, and payment to a stranger did not affect his rights.

The plaintiffs also contend that Fenwick was negligent in not giving the plaintiff notice of the assignment before the maturity of the note, and that he should therefore bear the loss. But the law does not impute negligence to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he receives interest from a third person, who offers to see that he receives his interest, or because he does not demand payment at the maturity of the mortgage. Fenwick owed no duty to plaintiffs in this respect, and none of his acts stated in the report required the inference that he was at fault with reference to the plaintiffs. The result is that the plaintiffs have shown no right to have the note and mortgage canceled, and their bill should be dismissed, without prejudice to their right to redeem, on paying the principal of the mortgage, with interest, from June 7, 1892; and a decree to that effect is to be entered in the superior court. So ordered.

Assignment of Mortgage and Note before Maturity and after Payment.

Watson *v.* Wyman, 151 Mass. 96; 36 N. E. 692.

HOLMES, J. This is a bill in equity for the cancellation of a mortgage, but containing an offer to pay any sum that may be found due upon it. The defendant Davis took an indorsement of the note and an assignment of the mortgage, for value, before maturity, and without notice. Before he did so the mortgagor had given the mortgagee a second mortgage for a sum including that due on the first mortgage, and in satisfaction of it, but had left the first mortgage in the mortgagee's hands. On the same day the plaintiff bought the second mortgage.

Payment of the mortgage note on the day when it falls due is performance of the promise, and very possibly would discharge the note, even as against one who took it for value and without notice later on the same day; but payment before the day, or a satisfaction like that in the previous case, is a defense which binds only the party receiving payment and those who stand in his shoes. Burbridge *v.* Manners, 3 Camp. 193 194; Morley *v.* Culverwell, 8 Mees. & W. 174, 181, 182; Kernohan *v.* Durham, 48 Ohio St, 1, 7; 26 N. E. 982; Head *v.* Cole, 53 Ark. 523, 524; 14 S. W. 898; Palmer *v.* Marshall, 60 Ill. 289, 293. See Wheeler *v.* Guild, 20 Pick. 545, 552, 553, 555.

It commonly is assumed that the mortgage follows the note, and that, if the holder can recover on the note, he may avail

himself of the mortgage. Taylor *v.* Page, 6 Allen, 86; Carpenter *v.* Longan, 16 Wall. 271; 1 Jones Mortg (4th Ed.), §§ 834–840. We are of opinion that this is the law where the note has been paid in full in advance. As is pointed out in Morley *v.* Culverwell, *ubi supra*, payment before the day is not performance of the contract, and it follows, notwithstanding the language often used, that in a strict sense it does not satisfy the condition of the mortgage. If we are right in our concession as to the effect of a payment on the day, we have here the technical reason for the different effect of an earlier payment. The note still stands unperformed, and therefore secured, subject only to a personal defense, as it is happily called by Mr. Ames. 2 Ames Bills & N. 811. But the very meaning of a personal defense is that it does not accompany the note into all hands, but only into those which are in no better position than the person against whom it has accrued. Like fraud of duress by threats, it leaves the legal transaction still in full force, and only furnishes a reason why a particular person should not be allowed to insist upon it. It "all proceeds upon an *argumentum ad hominem*. It is saying, 'You have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience.'" Eyre, C. J., in Collins *v.* Martin, 1 Bos. & P. 648, 651; cited by Shaw, C. J., in Wheeler *v.* Guild, 20 Pick. 535, 552.

Another argument drawn from the registry laws deserves consideration. A mortgage cannot be extinguished more effectually than by a release, yet we presume that it hardly would be argued that an unrecorded release would be valid as against a purchaser of the mortgage before maturity and without notice. As was said in a case which settled the law in Massachusetts: "A prior, unrecorded deed has no effect except as between the parties to it, and others having notice of it. * * * It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no record deed, he has the right to assume that the record title is the true title. The law has established the rule for the protection of creditors and purchasers that an unrecorded deed, if unknown to them, is as to them a mere nullity." Dow *v.* Whitney, 147 Mass. 1, 6; 16 N. E. 722. It might be thought that the same considerations apply to a quasi discharge by payment of the whole amount in advance. The mortgagor may have an entry made on the margin of the record of the mortgage. Pub. St., c. 120, §§ 24, 25. When no such entry is made, and the registry contains no notice of payment of any kind, it would seem that one to whom the mortgage produces the note, not yet due, and the mortgage, for sale, has the

right to assume that the record title is the true title that he would have had in the case of an unrecorded release. If the note were overdue, that would be notice, or would put the purchaser in the position of one having actual notice, and therefore in that case the registry laws would not help him.

In Grover *v.* Flye, 5 Allen, 543, the demandant claimed title under a sale of an equity of redemption on execution. In fact the mortgage had been paid in full before it was due, but the record did not disclose the payment, and neither the officer nor the demandant had notice of it. The court held that the rule was the same that it would have been between the original parties. In such a case the purchaser, of course, does not claim as indorser or holder of the mortgage note. We accept the authority of the decision so far as it goes. But if it is not to be distinguished satisfactorily from one like the present, so far as the argument from the registry laws is concerned, it has no bearing on the considerations first stated, and those are sufficient to dispose of the case. It follows that the decree sustaining the mortgage in the hands of the defendant Davis, and limiting the plaintiff to a right to redeem, was correct.

Decree affirmed.

Defective Foreclosure and Sale Operates as an Equitable Assignment of the Mortgage.

Lanier *v.* McIntosh, 117 Mo. 508; 23 S. W. 787.

MACFARLANE, J. The suit is ejectment in the usual form to recover a parcel of land 22 rods 6 feet long by 15 rods 7 feet wide, in McDonald County. The answer admitted the possession of McIntosh as tenant of his codefendant J. D. Shields, but denied all other allegations. It also set up the following special defense: "Defendants, for further answer, say and aver that at one time in the year 1886 defendant Shields gave to one John A. Kunkle a note for the sum of $270.00, to bear interest at the rate of ten per cent per annum, to secure which he executed a mortgage upon the property sued for herein to the said Kunkle, but the same has been long paid and satisfied, so no ground of action could exist on that account against him; notwithstanding which defendants are advised and aver that plaintiff pretends to make some claim of right to the possession of the land as a pretended assignee of the said mortgage after condition broken. Defendant Shields, while protesting that the said mortgage was long ago satisfied, comes and offers to pay into the court, for the benefit of the lawful owner of

the said mortgage debt, all and every sum and amount which may appear from the evidence in this case to be and remain unpaid thereon, if any, if it be found that the plaintiff is vested with the rights of the said mortgagee." The reply admits the execution and delivery of the note and mortgage by J. D. Shields, but denies that he ever paid the note or satisfied the mortgage, as charged in the answer. In support of his title plaintiff offered in evidence the following deeds: (1) Mortgagee's deed from John A. Kunkle to J. C. Seabourn, dated October 29, 1887. This deed purports to convey the land under power of sale contained in the mortgage made by defendant Shields, and described in the answer. (2) Quitclaim deed from J. C. Seabourn to George W. Corum, dated May 2, 1888. (3) Mortgage deed from George W. Corum to plaintiff, L. C. Lanier, to secure a note for $300, due in 10 days, with power of sale, in case of default, dated April 5, 1889. (4) Mortgagee's deed from L. C. Lanier, under power of sale to Alphonso Howe, dated May 18, 1889. (5) Quitclaim deed from Alphonso Howe to plaintiff, Lanier. No date given in abstract. The record of the mortgage from defendant Shields to Kunkle showed an entry of satisfaction on the margin, dated October 16, 1886, and signed by Kunkle, the mortgagee. In explanation of that entry of satisfaction, Kunkle testified that prior to the entry he had undertaken to sell the property under his mortgage, but misdescribed the land in both the advertisement and deed. At this sale Seabourn was also the purchaser, paying therefor $305, which paid the debt and cost and $17 or $18 over, which was paid to Shields, as mortgagor, to whom was delivered the note and mortgage, and he then entered satisfaction. That on learning of the misdescription of the land in the previous sale and deed, at request of the purchaser and Shields, he resold the property, merely to correct the mistake. On this sale nothing was paid. The evidence also tended to show that these purchases at mortgagee's sale were made by Seabourn at the request of Shields, his son Abe, and Gus Corum, and Seabourn undertook it for the benefit of defendant Shields. Seabourn gave them an agreement to convey as they should direct upon repaying him. The parties borrowed the money to pay for the land, and Seabourn signed the note as security, with the understanding that when the amount was paid he would convey as directed. Seabourn had the note to pay, but the money was afterwards repaid to him, a part by Abe Shields, but most of it by Corum; and at the request of Shields, Abe, and Corum, he conveyed the land to the latter. The evidence is not very clear from or by whom Seabourn was repaid. The evidence shows

further that the second sale made under the Shields mortgage was conducted by an agent, the mortgagee then being sick. Lanier was the stepson of Corum, and married the daughter of plaintiff. There was conflict in the evidence as to who was in possession of the property after Seabourn gave it up, which, if important, cannot be intelligently settled from what appears on the abstract. The facts were tried by a jury, and at request of plaintiff the court gave the following instructions: "The court instructs the jury that if they believe from the evidence that J. D. Shields and wife executed and delivered the mortgage deed to John A. Kunkle, read in evidence, and that after condition broken in said mortgage said Kunkle attempted to advertise and sell the land therein described, but by mistake failed to describe the said land in the advertisement and the mortgagee's deed, and that J. C. Seabourn became the purchaser at such sale, and paid the note, interest, and costs secured by said mortgage; and if the jury further find that by mistake in the first sale Kunkle entered satisfaction on the margin of the record of the said mortgage, and that thereafter, at the request of J. D. Shields, he advertised and sold the land in said mortgage deed according to the conditions therein, and executed and delivered to J. C. Seabourn the mortgagee's deed read in evidence, — then such conveyance vested the legal title to the land in controversy in Seabourn, and that J. D. Shields is stopped for denying Seabourn's title, or those claiming under him; and the successive conveyance from Seabourn and other, claiming under him, had the effect to visit in plaintiff all right and title of defendant Shields." Defendant asked, but the court refused to instruct, (1) that payment of the mortgage debt by Seabourn, the surrender of the note to Shields, and the entry of satisfaction of the mortgage on the record extinguished the power of sale, and the second sale and deed thereunder were nullities; (2) though the attempted sales may have operated as an assignment of the debt and mortgage to Seabourn, yet plaintiff, by the conveyances to him, succeeded to no such rights under the mortgage as would entitle him to recover in ejectment from the mortgagor; (3) that under the pleadings and evidence defendant Shields should have been permitted to recover.

1. It is conceded that the first sale attempted by the mortgagee, in failing to describe the land, either in the advertisement or deed, did not pass to the purchaser the legal title to the property sold. The same result would follow a conveyance with a like error by the owner. It is insisted, however, by defendants, that the sale and payment of the purchase money in discharge of the mortgage debt gave the purchaser no equitable right to the security,

but operated as a complete and absolute discharge of the debt and mortgage. To that proposition we do not yield assent. An assignment of a mortgage in order to transfer the entire legal and equitable interest of the mortgagee, must be by deed containing such words of grant as will show an intention of the parties to make a complete transfer. When a formal assignment is thus made, and the bond, note, or other evidence of the debt is assigned and delivered, the assignee will be invested not only with the legal estate, but with any power of sale contained in the mortgage. Pickett *v.* Jones, 63 Mo. 199; 1 Jones Mortg. 786; 15 Amer. & Eng. Enc. Law, 842. An equitable assignment does not require these formalities. In this State the mere assignment of the debt carries with it the mortgage as an incident, which may be enforced by the assignee in his own name; and an equitable assignment will be declared and enforced by way of subrogation whenever right and justice require that it should be done. So it is held that a sale of the mortgaged premises which is ineffective on account of defects in the execution of the power will operate as an equitable assignment of the mortgage to the purchaser if he paid the purchase money in good faith, and it was applied to the satisfaction of the mortgage debt. Wilcoxon *v.* Osborn, 77 Mo. 632; Honaker *v.* Shough, 55 Mo. 472; Priest *v.* City of St. Louis, 103 Mo. 652; 15 S. W. Rep. 989; Jones Mortg., § 1678. The evidence in this case shows that Seabourn purchased in good faith, and paid to the mortgagee the purchase price, which was applied to the payment of the debt secured. In this purchase he intended to buy and supposed he had bought, the mortgaged property. He got nothing in law for the money paid, and he was in equity entitled to the security of the mortgage for the amount due on the note when paid.

2. After a foreclosure sale under a mortgage the title of the purchaser comes through the mortgage. The mortgage is not satisfied, but foreclosed. It is therefore, in such case, improper to make an entry of satisfaction on the record. The entry made by the mortgagee in this case was intended to mean nothing more than that the mortgage had been satisfied by a sale of the premises. It could have no greater effect, at least between the parties, than the sale and deed thereunder. Indeed, after the equitable assignment of the mortgage, Kunkle, as mortgagee, as between himself and the purchaser, had no power to enter satisfaction. Entries of this kind are open to explanation by parol evidence, and a direct proceeding to impeach them is not required. Joerdon *v.* Schrimpf, 77 Mo. 384; Valle *v.* Iron Mountain Co., 27 Mo. 455; Chappell *v.* Allen, 38 Mo. 213. The evidence

shows very conclusively that this entry was made without authority, under a mistaken idea of duty, and under the belief that the sale had effectually foreclosed the mortgage. It should not be allowed to stand in the way of the purchaser's rights.

3. As to the effect of the second sale. By a recent well-considered decision of this court rendered in banc, it was held that a sale and conveyance of the mortgaged premises by a mortgagee or trustee, acting under a power, though defectively executed, passed the legal estate to the purchaser, subject to the right of redemption. In such case the title passes by a conveyance of the property by one holding the title. Schanawerk *v.* Hobrecht (Mo. Sup.), 22 S. W. Rep. 949. The first sale and conveyance here was not of the mortgaged property at all, owing to a misdescription; and the legal title was not affected, but remained in the mortgagee, who held it in trust for the benefit of the equitable assignee of the debt. Though the validity of the second sale may be questioned by reason of the irregularity arising from the absence of the mortgagee when it was made, and the employment of an agent to conduct it, there can be no doubt that the legal title passed to Seabourn by the deed, and under whom plaintiff claims through mesne conveyances.

4. Aside from all these considerations, we think the evidence conclusively shows that defendant Shields by his conduct and agreements, is estopped to dispute the absolute foreclosure of this mortgage. The first sale was made or attempted at his request, with the information that his son would buy the property. After the sale he received from the mortgagee $16 or $17, which remained of the proceeds of the sale after the debt had been paid. The second sale was made by Kunkle at the request of Seabourn and defendant Shields, and for the purpose, as they declared, of correcting the mistake in the previous sale, and of putting the title in Seabourn. So far as Kunkle acted it was under the direction of Shields. Shields' conduct is explained in the undisputed evidence that Seabourn, in making the purchases, was acting for him, his son, and Corum, under an agreement by which he was to convey the land, according to their direction, upon being reimbursed for what he had advanced. After the title, at the request of Shields, had been vested in Seabourn, a new arrangement was made, wholly independent of the mortgage. Under that agreement Seabourn was to hold the title as security for the money advanced to pay the mortgage debt. Under this transaction and contract the right of redemption, if it would otherwise have existed, was clearly waived by Shields, and he was estopped to dispute the validity of the mortgagee's sales. Austin *v.* Loring,

63 Mo. 22; Nanson *v.* Jacob, 93 Mo. 346; 6 S. W. Rep. 246; Jones Mortg., § 1484. If defendant has any remedy it is upon the contract under which Seabourn took and held the title for him, upon which no issue was made or determined in this record.

5. Under the foreclosure sale the legal title of the heirs of Mrs. Shields, wife of defendant, who died before the first sale, if any they had, also passed to the purchaser, and no one entitled is seeking to redeem their interest. A mere right of redemption in a third person, after foreclosure, is not such an oustanding title as will defeat a recovery in ejectment. The title "must be such a one as the owner of the title himself could recover on if he were asserting it in an action. It must be a present, subsisting, and operative title." McDonald *v.* Schneider, 27 Mo. 405; Woods *v.* Hildebrand, 46 Mo. 287. We see no error in the record, and the judgment is affirmed. All concur.

Foreclosure of Mortgage Where Part of the Mortgaged Property is Located in Another State.

Union Trust Co. *v.* Olmstead, 102 N. Y. 729; 7 N. E. 822.

Appeal from an order of the general term, fifth department, reversing so much of an order of the Monroe special term as denies a motion of plaintiff and the purchaser at a foreclosure to amend the judgment, and amending the judgment *nunc pro tunc.*

DANFORTH, J. The plaintiffs sought by foreclosure and sale, to enforce a mortgage executed by the defendant corporation. The supreme court had jurisdiction over the cause of action and the parties, and its decree is valid, although part of the premises covered by it are in another State. Its writ may not be operative there, nor its judgment capable of execution as against that portion of the property, and for that reason the court might have required the mortgagor to execute a conveyance to the purchaser in order that the whole security offered by the mortgage should, so far as possible, be made effective. Muller *v.* Dows, 94 U. S. 450. This was not done, but the power of the court was not exhausted, and what it might have ordered in the first instance it could still require by amendment. The order appealed from goes no further than to carry out the intention of the parties to the mortgage, as ascertained by the decree. It relates to a matter within the jurisdiction of the court, and its exercise is not the subject of review. The appeal should therefore be dismissed.

All concur except Miller, J., absent.

CHAPTER XI.

REVERSION.

To Whom Descendible.

Kellett *v.* Shepard, 139 Ill. 433.

MAGRUDER, C. J. Nelson Stillman died testate on August 31, 1871, in Galena, Jo Daviess County, and his will and the codicils thereto were admitted to probate in the county court of that county on September 18, 1871. The will is dated January 27, 1859. The first codicil bears date October 4, 1862, and the second, August 9, 1867. The testator left surviving him his widow, Louisa Stillman, and two children, Charles P. Stillman and Mary Louisa Stillman, and no other children or descendants of children. The widow subsequently married Thomas P. Kellett, and is the appellant herein. The son, Charles P. Stillman, died intestate on March 10, 1883, and left no children or descendants of children. He was twice married. His first wife obtained a divorce from him for his fault, and married a man named Eldredge, and is now known as Fannie Turner Eldredge. His second wife, named Louisa or Lucy, survived him, and is now his widow. The daughter, Mary Louisa Stillman, married a man named George Pride, from whom she was divorced for his fault some time before February, 1887, and thereupon resumed her maiden name. She died testate on December 4, 1888, leaving her surviving no husband nor child nor children, nor any descendants of child or children. Appellant, the widow of the testator, renounced the provisions of the will, and elected to take her dower in the realty and her share of the personalty, as allowed by law, and has long ago settled with the trustees under the will in relation thereto. The will gives and bequeaths the whole estate to three trustees, to have and to hold the same to themselves, their heirs and assigns forever, upon certain uses and trusts. The widow is to have the homestead and the income of one-third of the net residue of the estate during her life and so long as she remains unmarried. One-tenth of the residue or remainder is given to three charitable societies. The will then proceeds as follows: "*Fourthly.* All the residue and remainder of my estate, real and personal, at the time of my decease, after deducting all lawful expenses of settlement and management, to be disposed of as follows, to wit: The one-half of the same, being one-half of the residue to be so set apart, invested, secured, and conveyed and managed, so as to produce

and furnish a revenue or annual income which I direct to be paid in quarterly or half-yearly payments to my daughter, Mary Louisa, and for her sole and separate use during her natural life, and the principal of said portion so set off to be so conveyed that after her death it shall descend and go in reversion to her child or children should she have any; but, in case she died having no issue, in such case to go to and descend in reversion to my heirs at law. And all the residue or remainder of my net estate, real and personal, not otherwise provided for my said wife and daughter, and for said charitable purposes before named, the principal of the same to go to and revert to and be paid over to my son Charles Phelps when he shall have attained to the age of thirty years; and also all of the residue of the net income or yearly profits, after the above provisions are satisfied, is to go to and be paid over to him in half-yearly payments, to be for his use and support, until he receives his portion at the age of thirty years." The testator wills and bequeaths to his son the reversion of the homestead on the death or marriage of the widow, and directs that the property set apart "for a revenue or income for the support of my said wife, shall, after her death, descend in reversion to my heirs at law." The will provides for an appraisement of the real and personal property by the executors at the testator's death, as a basis for settling the bequests to the said societies. It gives the trustees and executors power to sell any of the real estate, except the homestead, and invest the proceeds, or "lease the same, as they may deem best for the interest of the family." It gives them power to invest the moneys of the estate and the discretion to decide at what time "to set apart and make separate provision of property for the income to be paid to my said daughter and wife," and also the discretion, if they deem best, to keep the estate together until the son reaches the age of 30. Each provision of property is to be subject to its own portion of all lawful charges against it, such as for taxes, insurance, etc. The trustees are appointed "guardians of the persons and estates of my children, or any of them, during their minority." The testator then proceeds to say: "Should I at my decease have other children living than the two provided for, * * * my children in such case, instead of the provisions made for my daughter, Mary Louisa, and my son, Charles Phelps, shall all receive the residue of my estate, share and share alike." After appointing the trustees to be executors, he closes his will as follows: "In recapitulation, my intentions and purposes in this will are: *First*, to provide a home for my said wife, and after her decease or marriage the homestead to revert to my son,

Charles Phelps; also to provide an income for the support and maintenance of my said wife during her life or widowhood, and after her decease the principal set apart for said provisions to descend in reversion to my heirs; *second*, to give one-tenth of the residue of my estate to the three charitable societies named, each to receive one-third of said one-tenth; *third*, to provide that one-half of the residue or remainder of my estate be set off for an income to my daughter, Mary Louisa, during her life, and the principal to revert to her children, should she have any; *fourth*, to provide that the residue of my estate go to my son, Charles Phelps, when he arrives at the age of thirty years, and the net residue of the income or profits until he attains that age."

The first codicil provides that, of the one-tenth given to the charitable societies, only $500 shall be given to each of them, and all of the one-tenth over $1,500, if anything, shall be invested in bonds, and the interest paid yearly or half-yearly to the testator's six sisters in certain proportions during their lives, the portion of each upon her death to go to his son, Charles P.; "and, after the decease of all of the above-named sisters, the principal so provided shall descend and go to my said son, Charles Phelps, and to his heirs." It also provides that the executors may, at the written request of the widow, if they shall think it for the interest of the family, sell the homestead and invest the proceeds for the widow, so long as she remains unmarried, "and, after her marriage or decease, the principal so provided for said income shall go and descend to my son, Charles Phelps Stillman." The second codicil merely provides for the mode of paying the widow dower in real estate unsold, and in its proceeds, if sold, in case of her remarriage, and for the payment of the income in the one-tenth that had belonged to one of the sisters, that had died, to two of the living sisters. The debts of the testators were all paid. The dower of the widow was apportioned to her in the personal property. On June 25, 1882, the son, Charles P. Stillman, attained the age of 30 years, and the trustees paid and turned over to him all his share of the real and personal property of the estate under the will, and made a full settlement with him, and took his receipts therefor. One of the three trustees resigned in July, 1877, and another died in October, 1882. In a proceeding thereafter begun by the remaining trustee in the circuit court of Cook County against Mary L. Stillman, the daughter and the appellant and her husband, and the trustee who had resigned, and the heirs of the deceased trustee, a decree was entered on February 28, 1887, finding that the real and per-

sonal property then remaining, and vested in said trustees or their heirs, was as follows: The premises Nos. 198, 200, and 202, North Clark street, in Chicago, subject to a yearly dower of $392 payable to appellant; the undivided half of the premises No. 166 South Clark street, in Chicago, subject to the dower therein of appellant; a lot on East Fifty-Seventh street, in New York City, which had been conveyed by one Hamilton on June 3, 1881, to Mary L. Stillman; money amounting to $1,693.75,— and that said property and money was then held by said trustees in trust for said daughter, Mary L. Stillman, during her life, and after her death upon further trusts. The said decree appointed John G. Kendig trustee in place of the former trustees, whose accounts were settled and approved, and directed that said money and property be paid and conveyed to said new trustee to hold for the benefit of Mary L. Stillman (subject to said dower rights) upon the same trusts and subject to the provisions of said will. The directions of the decree were subsequently carried out. It is admitted herein by both parties, both in the pleadings and upon argument, that the premises in New York city above mentioned were obtained by said trustees from Mary L. Stillman in her lifetime in return for moneys belonging to the estate, which were advanced to her at her request, "and that said premises are, in law, personal rather than real property, belonging to said estate."

The only interest which is in controversy in this suit is that which was set apart by the will for the use of Mary L. Stillman during her life. That interest consists of the money and the Chicago and New York property above described. The bill in the present case was filed in the superior court of Cook County on November 11, 1889, by the appellees herein, who are the sisters and brother and nephews and nieces of the deceased, Nelson Stillman, for the partition and distribution of said property and money among themselves, and for a construction of said will. The defendants to the bill were the trustee, Kendig; Louisa Kellett, the appellant, and her husband; Daniel B. Childs, executor of the estate of Mary L. Stillman, deceased; a sister of Nelson Stillman; and certain of his nephews and nieces, and others. The contention of appellees is that the brother and sisters and nephews and nieces of Nelson Stillman were his heirs at law when his daughter died, and are therefore owners of said money and property. The contention of appellant is that Charles P. Stillman and Mary L. Stillman, who were the testator's heirs at law at his decease, took the share in which the daughter had a life interest, and that the appellant, as heir of her son and daughter, is entitled to

have all of said money and property. Appellant further contends that, if the interest in question is to go to those who were her husband's heirs at the time of her daughter's death, she was one of such heirs, and as such inherited one-half the realty and all the personalty. The decree of the court below found that the persons designated as heirs at law in the fourth clause of the will were those who were such at the date of the death of Mary L. Stillman, and that appellants were entitled to all the personalty, and one-half of the realty, and that the appellees were entitled to the other undivided one-half of the realty, and that partition and distribution should be made accordingly. The appellant appeals from so much of the decree as gives any portion of the estate to the appellees. The appellees assign, as cross-error, that the decree gave any portion of the estate to the appellant.

Manifestly, the decision of this case depends upon the construction to be given to that part of the fourth clause of the will, as above quoted, which concerns the share set apart for the use of the daughter. The will gives her a life-interest in said share, and then provides that, "after her death it shall descend and go in reversion to her child or children should she have any; but in case she died having no issue, in such case to go to and descend in reversion to my heir at law." As the life-estate has ended, and the tenant for life died without issue, it becomes material to inquire who were the heirs at law to whom the share in question has gone and descended in reversion. Ordinarily, the words "heir," or "heirs at law" are used to designate those persons who answer this description at the death of the testator. The word "heir," in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bl. Comm. 201; Rawson *v.* Rawson, 52 Ill. 62. Hence where the word occurs in a will it will be held to apply to those who are heirs of the testator at his death, unless the intention of testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will. This construction or definition is not changed by the fact that a life-estate may precede the bequest to the heirs at law, nor by the circumstance that the bequest to the heirs is contingent on an event that may or may not happen. 2 Jarm. Wills (Rand. and T. 5th Amer. Ed.), 672; 2 Williams Ex'rs (6th Amer. Ed.), 1211.

In the case at bar, the heirs at law who were to take the share set apart to the daughter, after her death without issue, were the son, Charles P., and the daughter, Mary L., who were living at

the time of the testator's death, and were his only heirs at law at that time, unless it shall appear that a contrary intention is plainly indicated by the will, construed as a whole and with reference to all its provisions. It is no proof of such contrary intention that the daughter at the expiration of whose life-estate the distribution was to be made, was herself one of the heirs at law. Nor does it make any difference in the correctness of this construction whether those who are heirs at law at the time of the testator's death are living or dead when the period of distribution arrives. Bequests of personalty as well as devises of real estate are subject to this rule of construction. Cases which hold to the contrary of the views here expressed are those where the intention of the testator to designate as his heirs at law those who should be such at the period of distribution has been clearly manifested by the terms of the will. In the present case we think that the estate set apart for the use of the daughter vested in the son and daughter, as heirs at law of their father at the time of his decease. Although the trustees held the legal title, the equitable title was vested in the son and daughter, subject to be divested by force of the will in the event that Mary Louisa should have children. The reversionary estate vested in the heirs at law at the testator's death, was liable to open to let in her children in case she should have any; but in the meantime it subsisted in the heirs for the purpose of drawing the possession to them in the event of her death without children. The law always gives the preference to vested over contingent remainders. It does not favor the abeyance of estates. Estates in remainder vest at the earliest period possible unless a contrary intention on the part of the testator is clearly manifested. Abbott *v.* Bradstreet, 3 Alden, 587; Tayloe *v.* Mosher, 29 Md. 453; Schofield *v.* Olcott, 120 Ill. 392; 11 N. E. Rep. 351; Gilpin *v.* Williams, 25 Ohio St. 283.

Where it is a remainder after a life-estate, it is regarded as a vested remainder, and the possession only is postponed. Abbott *v.* Bradstreet, *supra*. The fact that the gift or devise must open to let in after-born children is not inconsistent with the vesting of the estate in interest at the testator's death, though the vesting in possession is deferred to the period of distribution. McCartney *v.* Osborn, 118 Ill. 103; 9 N. E. Rep. 210. "When a bequest is made to one or more for life, remainder to the testator's heirs or next of kin, or such persons as would take his estate by the rules of law if he had died intestate, the bequest is to those who are heirs or next of kin at the time of his decease." 2 Williams Ex'rs (Perkins' 6th Amer. Ed.), p. 1212, note *d*, and cases cited. "Where, in the construction of

a clause, there is a doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken." 2 Jarm. Wills (Rand & T., 5th Amer. Ed.), p. 406, and cases. In Bullock *v.* Downes, 9 H. L. Cas. 1, the lord chancellor said: "Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life-interest was given is also a member of the class to take on his death.

There is a review of the English cases upon this subject in 2 Jarman on Wills (5th Amer. Ed.), pp. 670–683, and it is there stated that the law as laid down in Holloway *v.* Holloway, 5 Ves. 399, "has long been clearly settled." That was a case where a testator bequeathed £5,000 in trust for his daughter for life, and after her decease for her children living at her decease, in such shares as she should appoint; and, in case she should leave no child, then, as to £1,000, in trust for the executors, administrators, and assigns of the daughter; and as to £4,000 the remainder in trust for the person or persons who should be his heir or heirs at law. The daughter died without leaving children; and she and two other daughters were the testator's heirs at law. The master of the rolls held that the *prima facie* construction of the words and their legal meaning would be 'heirs at law at the testator's own death;' and that he could not, upon the ground that the daughter was one of the heirs, conclude that heirs at a subsequent time were intended." There is also an able review of the cases by Mr. Justice Hoar, of the Supreme Court of Massachusetts, in Abbott *v.* Bradstreet, *supra*, where most of the cases to which we have been referred by counsel for appellees are commented upon and shown, to be exceptional, and to be founded on special circumstances indicating the intention of the testator to make a gift or devise to those who were his heirs at the time of distribution. It is there said that Holloway *v.* Holloway is a leading case, which has been repeatedly followed and cited with approbation, and a succession of decisions is pointed out in which its doctrine has been approved.

We have set forth herein substantially all the material portions of Nelson Stillman's will, and, upon the application thereto of the principles already announced, we discover no intention on his part to designate those who should be his heirs at law at the date of his daughter's death as the persons who were to take the

interest set apart for use during her life. In the absence of such intention, the established rules of construction which point to those who were the heirs at law at the date of his decease, as the parties entitled to take, must prevail. In Cable *v.* Cable, 16 Beav. 507, it was said: "There is always a difficulty in fixing the death of the tenant for life as the period at which the next of kin of the testator are to be determined, for in so construing it you must introduce the words, 'if the testator had died then;' that is, the sentence must run thus: 'To my next of kin as if I had died at the same time as the tenant for life.'"

In recapitulating his intentions and purposes at the end of the will, the testator says, in the third paragraph, that he intends "to provide that one-half of the residue or remainder of my estate be set off for an income to my daughter, Mary Louisa, during her life, and the principal to revert to her children, should she have any." It will be observed that here he omits the following words, which he had previously used: "But in case she died having no issue, in such case to go to and descend in reversion to my heirs at law." In the recapitulation he provides for no disposition whatever of the one-half of the residue in the event of his daughter's death without issue. If the third paragraph of the recapitulation had been the only provision in the will in regard to this share, the law would give it, at the death of the daughter without children, to those who were the testator's heirs at law at his decease. Bates *v.* Gillett, 132 Ill. 287; 24 N. E. Rep. 611. All parts of the will must be construed together. The second provision, which leaves the remainder undisposed of, and the first provision, which directs it to go to the testator's heirs at law, evidently mean the same thing. Under the second provision, the estate would descend, as intestate estate, to the testator's heirs at law. Bates *v.* Gillett, *supra*. It follows that the testator intended to designate, by the use of the words, "heirs at law" in the first provision, those who would be his heirs in case of intestacy. The estate, in case of intestacy, would have gone to his son and daughter. Rawson *v.* Rawson, 52 Ill. 62. The provision in the fourth clause of the will is that the remainder shall "go to and descend" in reversion to the testator's heirs at law. In Abbott *v.* Bradstreet, *supra*, the words were, "at whose decease the said fund is to go and descend to my heirs at law," and it was there said: "The words 'go and descend' are significant, as indicating the wish of the testator that the remainder should be distributed as if it were intestate estate." It would not be an unreasonable construction of the present will to hold that the devise of the reversionary interest to the heirs

at law was void, because it gives precisely the same estate that the heirs would take by descent if the particular devise to them had been omitted from the will. The title by descent is regarded as a worthier and better title than the title by devise or purchase. 4 Kent. Comm. *506, *507; Ellis *v.* Page, 7 Cush. 161. But such construction is unnecessary here, as the estate vested in interest at the testator's death, although the vesting in possession or enjoyment was postponed until the death without issue of the tenant for life. The remainder in this case is not a contingent one, so as to postpone the vesting in interest, as well as in possession, until the period of distribution. A remainder is contingent if the persons who are to take are not *in esse*, or are not definitely ascertained. Bates *v.* Gillett, *supra*. Here the heirs at law were *in esse* and definitely ascertained at the testator's death. Although the remainder vested in them at that time was liable to open and let in the children of the daughter, if there should be any. We cannot see that there is any element of futurity or supervisorship annexed to the gift itself. McCartney *v.* Osburn, *supra;* Cheney *v.* Teese, 108 Ill. 473. That which is postponed is the enjoyment of the estate, and not the vesting of the title to it. The testator does not direct the remainder to go to those who shall be his heirs at the termination of the life-estate, or to those heirs who shall be surviving at that time. He nowhere in his will evinces an intention to have the reversionary estate descend to his brother and sisters, or their descendants. Such an intention is negatived by the fact that he contemplated the possibility of having other children at his death than the two named in the will; by the fact that, under the provision of the codicils, the fund, whose income was to be paid to his sisters, was to go, after their death, to his son "and to his heirs;" and by the further fact that all the specific provisions of the will are in the interest of his son and daughter, and such other children as he might have at his death. The language of the fourth clause implies a present gift to his heirs at law, and amounts to a devise of the reversion directly to such heirs, subject to the life-estate, and charged with a contingent interest in the daughter's children, if she should have any. Another significant circumstance is the fact that the principal fund, whose income is set apart for the support of the testator's widow during her life, is to go, after her death, "in reversion to my heirs at law." It cannot be supposed that the testator intended the expression "heirs at law" to have one meaning when applied to those who should take at the termination of the daughter's life-estate, and another meaning when applied to those who should take at the termination of

the widow's life-estate. If the heirs at law designated by the will are those who shall be such at the respective periods of distribution, then the heirs at law at the widow's death might not be the same as the heirs at law at the daughter's death. The more natural supposition is that the testator intended to leave the share set apart to the widow for life to the same persons who would take the portion set apart for the daughter's use during her life. The only way to effectuate such intention is to give to the words "heirs at law" their legal import and meaning, as indicating those who are heirs at law at the testator's death. Moreover, to hold that his intention was to point to his brother and sisters and their descendants as the persons who would be his heirs at law at his widow's death, would be to hold that he anticipated the death of his children as likely to occur before the death of their mother. There is nothing to indicate that he expected his widow to outlive his children, although such has turned out to be the case. In view of the construction thus given to the will, it follows that the title to the property in controversy vested in Charles P. Stillman and Mary Louisa Stillman at the testator's death. At the death of Charles, his one-half interest therein descended as follows: All his interest in the New York lot, which is to be regarded as personalty, and in the money in the hands of the trustees, and one-half of his interest in the Chicago land, and dower in the other half, went to his widow, Louise or Lucy Stillman; the other half thereof descending, two-thirds to his mother, and one-third to his sister. Upon the death of Mary Louisa, her whole interest in said property, including her original one-half thereof and the one-third inherited from her brother, descended to her mother, the appellant herein. There is nothing in the record to show what the will of Mary Louisa Stillman is. It does not seem to have had reference to anything more than certain accrued rents which are given to her executor by the decree below. Counsel for both sides have treated her estate as intestate, so far as the property involved in this litigation is concerned. As we understand it, her executor is not complaining of the decree below. We do not deem it necessary to discuss the question whether the lot in New York City, considered as personalty, should be divided or distributed in accordance with the laws of New York, or in accordance with those of Illinois. We have treated it as subject to distribution according to the statutes of Illinois. The appellees cannot complain of this mode of distribution, because it cannot concern them how the distribution is made, in view of the construction we have given to the will. Nor can the appellant complain, as her coun-

sel takes the position before this court that the statutes of Illinois, and not those of New York, should govern in the matter of such distribution. The decree of the superior court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

CHAPTER XII.

REMAINDERS.

Outland *v.* Bowen, 118 Ind. 150; 17 N. E. 281.
Crozier *v.* Bray, 120 N. Y. 366; 24 N. E. 712.
Siddons *v.* Cockrell, 131 Ill. 653; 23 N. E. 586.
Hitchcock *v.* Simpkins, 99 Mich. 198; 58 N. W. 47.
Coxey *v.* Springer, 138 Ind. 506; 37 N. E. 506.
McGee *v.* Hall, 26 S. C. 179; 1 S. E. 711.
Foster *v.* Hackett, 112 N. C. 546; 17 S. E. 426.
Chapin *v.* Crow, 147 Ill. 219; 35 N. E. 536.
Seaver *v.* Fitzgerald, 141 Mass. 401; 6 N. E 73.
Carson *v.* Fuhs, 131 Pa. St. 256; 18 A. 1017.
Godman *v.* Simmons, 113 Mo. 122; 120 S. W. 972.

Limitations of a Remainder After a Fee Upon Condition.

Outland *v.* Bowen, 118 Ind. 150; 17 N. E. 281.

MITCHELL, J. On the 25th day of February, 1855, Joseph Bowen, Sr., executed a warranty deed in the common form, by which he conveyed a tract of land, situate in Wayne County, to his granddaughter Rebecca Elizabeth Bowen, for the expressed consideration of $800. Following the description of the premises conveyed, there was written this stipulation: "The condition of the above deed is such that if the said Rebecca E. Bowen should die, leaving no child or children, the above-described land, or its proceeds that may be realized by sale or otherwise, is to fall back to the lawful heirs of Joseph Bowen, Sr.; and also, should the guardian of the said Rebecca E. Bowen see fit to sell the above land, he can, by appropriating the proceeds of the sale to the uses of the said Rebecca E. Bowen while she may live, and then apply the balance, if she should die without heirs of her body, to the heirs of Joseph Bowen, Sr." Subsequent to the execution of the deed, the grantee was united in marriage with the appellant Joseph Outland, with whom she lived on the land conveyed, until the year 1883, when she departed this life, leaving surviving her no child or children. Her husband and mother survive as her only heirs at law. The present litigation involves a controversy between those describing them-

selves as the lawful heirs of Joseph Bowen, deceased, grantor in the deed above mentioned, and the surviving husband and mother of Rebecca E. Bowen, concerning the title and ownership of the land conveyed by the deed of Joseph Bowen. The final determination of this controversy depends wholly upon the construction to be given to the deed; it being conceded that both parties assert title through that instrument. The inquiry is, what was the duration and quantity of the estate created in Rebecca E. Bowen, the first grantee, and was there a valid remainder, or estate of any description limited over, to those who now claim as the lawful heirs of the grantor?

It is contended, on behalf of the appellants, that the estate conveyed to the grantee named in the deed was one which, according to the rules of the common law, would have been adjudged an estate tail; and that, since estates of that description have been abolished by statute in this State (section 2958, Rev. St. 1881, in force since May 6, 1853), it is now to be construed a fee-simple absolute. Without pausing to consider the sometimes apparently artificial refinements, or the numerous technical and ingenious distinctions of the common law in respect to the character of estates in land, we deem it sufficient to state our general conclusion here; and that is that the estate created by the deed in question, while in many respects bearing some analogy to an estate tail, was not one having the essential characteristics of an estate of that description. Ordinarily, an estate tail is created by a conveyance or devise in fee to some particular person, with a limitation over, in the event of the death of the person named without issue, or upon an indefinite failure of issue. The doctrine of the books seems to be that whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance, in a direct line, and in regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail. Huxford *v.* Milligan, 50 Ind. 542; King *v.* Rea, 56 Ind. 1; Tipton *v.* La Rose, 27 Ind. 484; Shimer *v.* Mann, 99 Ind. 190; Eichelberger *v.* Barnitz, 9 Watts, 447; Pott's Appeal, 30 Pa. St. 168; 1 Shars. & B. Lead. Cas. Real Prop. 98. But it is well settled, on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of an issue within a given time, the estate will not belong to the class known as estate tail. Hill *v.* Hill, 74 Pa. St. 173; Nightingale *v.* Burrell, 15 Pick. 104; Allender's

Lessee *v.* Sussan, 33 Md. 11. The deed under consideration created in Rebecca E. Bowen an estate in fee, which was determinable, however, upon the contingency that she should die leaving no child or children. There is nothing in the deed indicative of an intention to limit or restrain the grantee in the disposition of the estate, in the event she should leave surviving her a child or children. It left the estate to be transmitted to the child or children of the grantee, if any should survive, or to the disposal by her in such other manner as she might determine; the only limitation or condition being that she leave surviving a child or children. In this respect the deed lacks an essential element in the creation of an estate tail. Moreover, it will be observed that, according to the conditions in the deed, if the grantee died without leaving a child or children, it is of no consequence that she may have had children, through whom she may have left grandchildren or other lineal descendants. The whole estate was granted to her in fee, but it was made to determine by a limitation over in fee upon the contingency of her death without leaving a child or children. Upon the happening of that event, whether soon or late, the land, or, in case that had meanwhile been sold or otherwise disposed of, then the proceeds realized, was to vest in such persons, if any there could be, as might at that time occupy the relation of "lawful heirs" to the grantor. The foregoing considerations confirm our conclusion that the estate created in Rebecca E. Bowen was not one which, at the common law, would have been adjudged an estate tail. Of the estate created by the deed to Rebecca E. Bowen we may say, primarily, it was a fee-simple; and, notwithstanding the condition subsequently written in the deed, the estate was liable to become absolute, and continue perpetually in the first taker, her heirs and assigns. 1 Washb. Real Prop. 61, 62. This created in her a fee-simple conditional, or a fee of a determinable or conditional character. Smith *v.* Hunter, 23 Ind. 580; Clark *v.* Barton, 51 Ind. 165; Greer *v.* Wilson, 108 Ind. 322; 9 N. E. Rep. 284; Tied. Real Prop., § 26; Gray Perp., § 40. It was necessary that two contingencies should arise or exist concurrently, in order that the estate created might be defeated. One was that the grantee of the precedent estate should die without leaving a child or children surviving; the other was that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over. Hennessy *v.* Patterson, 85 N. Y. 91. The land was conveyed in fee to the first taker, and it remained uncertain until her death whether the estate conveyed would be defeated by the condition in the deed or become

absolute; and it could not be known, until the death of the grantor, who would take as his lawful heirs. Since it was doubtful whether either of these contingencies would happen, the grant created a fee in the grantee, and there remained in the grantor no future estate in reversion, but only what is called a naked possibility of reverter. Tied. Real Prop., § 385. In no event was the estate to revert to the grantor or his heirs, so as to give them a right of re-entry as for a condition broken. The estate was to be carried over to the grantor's lawful heirs by the force and effect of the deed. The first taker's estate was therefore not an estate upon condition, but it was a conditional or determinable fee, with a conditional limitation over. The essential difference between an estate upon condition and an estate in fee, which determines upon the happening of some future uncertain but possible event, with a limitation over, conditioned upon the happening of the event, is that in the latter case, upon the happening of the event, the estate either reverts to the grantor, or is carried, by force of the deed, to the person to whom it was granted; while in the former the grantor must have either expressly or by necessary implication reserved to himself or his heirs a right of entry upon breach of condition — re-entry being necessary to revert the estate. Attorney-General *v.* Manufacturing Co., 14 Gray, 586. "A conditional limitation is an estate limited to take effect after the determination of an estate which, in the absence of a limitation over, would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation." 2 Washb. Real. Prop. 281, 562; Tied. Real Prop., § 281; Church *v.* Grant, 3 Gray, 142; Miller *v.* Levi, 44 N. Y. 489; Chapin *v.* Harris, 8 Allen, 594; 1 Shars. & B. Lead. Cas. Real Prop. 186. Concerning estates upon conditions subsequent, see Cross *v.* Carson, 8 Blackf. 138; the same case, with invaluable note, 44 Amer. Dec. 742–759. Conditional limitations were not recognized by the common law as estates capable of being created by the same deed with a prior estate or limitation. They could only be created, so as to become valid and effectual, under the statutes of uses and trusts, as shifting uses or executory devises. Tied. Real Prop., §§ 281, 418.

The second conclusion at which we have arrived is that the limitation over to the "lawful heirs" of the grantor in the deed in question, whether considered as a conditional limitation or as a contingent remainder, is void. It cannot take effect for several reasons, some of which we proceed to state. Prior to the conveyance through which all the parties to this controversy claim title, the estate conveyed to Rebecca E. Bowen, as well as the

remainder or contingent estate limited over, formed one united estate in Joseph Bowen, Sr. The entire estate was disposed of by the deed; there being no reversion to the grantor. As we have seen, the estate created in the first taker was not an estate upon condition, with a right of re-entry reserved to the grantor or his heirs, but a determinable or conditional fee, with a conditional limitation or remainder over. There was, therefore, no reversion to the grantor, or right of entry in his heirs. They cannot and do not claim as reversioners by inheritance from their ancestor, but through his deed, as remainder-men, or as the owners of an estate created by a conditional limitation. They claim to derive their title through the same instrument as that through which the heirs of Rebecca E. Bowen claim. Williams Real Prop. 250. It must follow, therefore, if there was no estate left in the grantor after the creation of the precedent trust-estate, vested in the first taker, he could create no remainder, as a remainder can only be created out of the estate left in the grantor after the creation of the particular estate. After the conveyance of an estate in fee, whether the fee be base, determinable, or conditional, there is nothing in the nature of an estate in the grantor out of which to create a remainder. It has therefore been laid down as one of the fundamental rules in respect to the disposition of real estate that a remainder cannot be limited to take effect after a fee; or in other words, "where there is no reversion, there can be no remainder." Tied. Real Prop., § 398, and cases cited in note; Huxford *v.* Milligan, *supra*. This rule has always been held inflexible in cases of estates created by an ordinary deed, and is applied to estates limited over, whether they be contingent remainders or conditional limitations. Gray Rest. Alien., § 22, and note. Its force has been in nowise impaired or modified by section 2960, Rev. St. 1881, which has reference solely to the contingency upon which the remainder over shall take effect, and not to the quantity or duration of the precedent estate. It simply changes the common law rule so as to allow the remainder over to abridge the precedent estate. The only modification of the rule in this State, in respect to the power to limit one fee upon another, results from the enactment of section 2962, which, among other things, declares that "a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age." The estate

limited over in the deed involved in the present case does not come within the provisions of the above statute. The first estate was a fee, and a limitation over was to take effect at an indefinite period, depending upon the event of the death of the first taker at an undefined age. The distinction between estates in remainder, such as might be created by deed at common law, and executory interests, such as could only be created by executory devises in wills, or by conveyances to uses, by creating shifting and springing uses in deeds, is not to be lost sight of. Estates of the latter description arise, when their time comes, of their own inherent strength, and, when properly created, do not depend for protection on any prior estates. Church *v.* Grant, *supra;* Den *v.* Hance, 11 N. J. Law, 244; 1 Shars. & B. Lead. Cas. Real Prop. 151, 189; Williams Real Prop. 265, 283. Except as authorized by the statute last above referred to, within the rule against perpetuities, an estate in fee cannot be limited on estate in fee by an ordinary deed of conveyance, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use. The creation of estates of that character requires a resort to other methods, concerning which nothing further need be said here. The rule that a remainder in fee cannot be limited to take effect after an estate in fee is especially applicable in case the grantee of the precedent estate has, as is the fact in the present case, a general power of disposition; thereby leaving the limitation over to operate only upon what is left at the death of the first taker. In such a case the limitation over cannot take effect either as a remainder or as an executory interest. Tied. Real Prop., § 398, and note.

The limitation over is void for another reason. The contingency upon which the conditional limitation was to take effect was liable to happen at any moment after the execution of the deed. The grantor having granted the whole estate in fee to the first taker, without reserving any estate to himself or to any other person, it was necessary that there should have been some certain person in being in whom the contingent or conditional estate limited over could vest immediately upon the happening of the contingency which terminated the precedent estate. Shars. Bl. Comm, bk. 2, pp. 166–169, and note. The limitation over was to be the "lawful heirs" of Joseph Bowen, the grantor, who was then in life. As no one can be heir to the living, it follows that, there was no person in being competent to take the estate limited over. Moore *v.* Littel, 41 N. Y. 66; Winslow *v.* Winslow, 52 Ind. 8; Lyles *v.* Lescher, 108 Ind. 382; 9 N. E. Rep. 365. Whether a limitation is valid or not is to be deter-

mined by the deed alone, and not by what might have happened, or by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself. Bailey *v.* Sanger, 108 Ind. 264; 9 N. E. Rep. 159. It cannot be inferred that the expression "lawful heirs," as employed in the deed, was intended as the equivalent of "children." The situation of the parties and circumstances tend to rebut such an inference. The limitation over being void, the estate of the first taker continues unimpaired. Leonard *v.* Burr, 18 N. Y. 96. The rule applicable to such cases is that a conveyance in fee which, by a subsequent condition, is subject to an executory interest or limitation which is void by reason of remoteness, or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee-simple absolute. Church *v.* Grant, *supra;* Locke *v.* Barbour, 62 Ind. 577; Gray, Perp., § 250.

Another and an independent reason why the limitation over is void and of no effect is that the deed confers upon the taker of the precedent estate a general and unlimited power of disposition. This feature of the case need not be enlarged upon. As has been remarked, the deed created primarily an estate in fee in the grantee, subject to a condition, however, that, upon the happening of a certain contingency, the land, "or its proceeds, that may be realized by sale or otherwise, is to fall back," etc. By necessary implication, this conferred the power upon and recognized the right of the grantee, on arriving at the age of twenty-one years, to dispose of the land. After conferring an unrestricted power of sale, the attempt to hold onto or control the proceeds realized was futile. Whatever the intention of the grantor may have been, the power of disposition was fatal to the limitation over, the rule in such cases being that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void. Gifford *v.* Choate, 100 Mass. 343; Hale *v.* Marsh, *Id.* 468; Ramsdell *v.* Ramsdell, 21 Me. 288; Jones *v.* Bacon, 68 Me. 34; Van Gorder *v.* Smith, 99 Ind. 404. This subject was exhaustively considered, and the authorities collected, in Van Horn *v.* Campbell, 100 N. Y. 287; 3 N. E. Rep. 316, 771. The power in the deed under consideration being general, coupled with an ill-defined and ambiguous interest in fee, the effect of the power is to raise the estate of the first taker, and define it as a fee-simple absolute. Where the estate of the first taker is certain and particularly defined, or where the power is limited and special, the power will not enlarge the estate, as against a valid limitation over. Some rules must, however, be framed by which to arrive

at the uncertain and ambiguously expressed intention of parties; and as absolute power of disposition and absolute ownership must, in the nature of things, be inseparably connected, the law declares that he to whom the one is given acquires the other, by irresistible implication, unless the contrary clearly appears by the terms of the deed. Van Gorder *v.* Smith, *supra;* and cases cited. John *v.* Bradbury, 97 Ind. 263, was decided upon the facts peculiar to that case, and contains nothing opposed to the conclusions arrived at here.

It follows from the conclusions thus reached that the demurrer to the complaint should have been sustained. The judgment is therefore reversed, with costs.

Limitations of Whatever Remains Undisposed of by Prior Devisee Held to be a Good Remainder.

Crozier *v.* Bray, 120 N. Y. 366; 24 N. E. 712.

Appeal from a judgment of the general term of the Supreme Court in the fifth judicial department, denying a motion by the plaintiffs for a new trial, and directing judgment for the defendants upon a verdict rendered in their favor at circuit.

This was an action of ejectment, to recover the possession of an undivided interest in about 180 acres of land situate in the county of Ontario. The land formerly belonged to one Luther Whitney, who died, seised thereof, on the 19th day of May, 1878, leaving a last will and testament dated February 13, 1864, and a codicil thereto dated March 19, 1872. The following are the material portions of said will: "After paying my funeral charges and lawful debts, I give and bequeath to my beloved wife, Hannah L., all personal property, such as horses, cattle, sheep, swine, poultry, farming tools, grain, hay, books, and household furniture, forever. I give and devise to my wife, and my two daughters, Tasey and Harriet P., in common, all my land or real estate, to occupy and dispose of as they may think proper, provided my wife and my daughter Tasey have a comfortable home in the house, together with all the fuel, fruit, and other proceeds of the farm, to which they will be entitled as joint owners: provided, further, that, should my daughter Harriet P. die without leaving a child or children, her share of my estate be equally shared by my wife and daughter Tasey. Further, the land is devised as above, subject to the following legacies, which I direct my executors, hereinafter named, to pay at or before the expiration of four years after the death of myself and wife, but without interest: I give and bequeath to my daughter Cornelia one thousand dol-

lars, but in case of her death without leaving a child or children, I will it to my wife, and two daughters, Tasey and Harriet P., unless Harriet P. should die without leaving a child or children, in which case I direct my executors to pay it to my wife and daughter Tasey." The rest of the will provided for the erection of a tombstone and named the executors. The codicil, aside from a clause nominating a new executor in the place of one who had died, is in these words: "Whereas, I, Luther Whitney, in Seneca, of the county of Ontario and State of New York, have made my last will and testament in writing bearing date the 13th day of February, A. D. 1864, now, I do by this writing, which I hereby declare to be a codicil to my said will, and to be taken as a part thereof: I therefore will and direct that all that may remain of the property of my wife, Hannah L., both real and personal, at her decease, be made over to and become the property of Cyrus Bray; providing said Cyrus Bray should decease before my wife, then the property that my wife should leave at her decease shall be received by my two daughters, Tasey and Harriet P., and become their property and their heirs." The testator, who was 96 years old at the time of his death, had been married twice. He left as heirs at law by his first marriage three children, George, Hannah, and Dolly, and one grandchild, the daughter of Nathan, a deceased son. By his second marriage he left three daughters, Cornelia, Tasey, and Harriet. Cyrus Bray married Harriet, and for many years lived with the testator and worked the farm. The second wife, Hannah L., died before the testator, and she never had any property. While five of the heirs at law united in bringing this action, only one appealed from the judgment in favor of the defendants.

VANN, J. (*after stating the facts as above*). The appellant claims that the will gave an estate in fee to the wife, Hannah L., that the devise over to Cyrus Bray by the codicil is void on the ground of repugnancy; and that by the death of Hannah L. before her husband the portion devised to her lapsed, and, as there was no residuary clause, descended to the heirs at law of the testator. The respondents claim that the will and codicil, when construed together, show that it was the intention of the testator that his wife should take a life-estate only, with the remainder over to Cyrus Bray. The position of each is not without the support both of reason and authority, and it is not surprising that the learned judges of the general term did not unite in pronouncing judgment. While no construction can be given to the will and codicil that will satisfy all fair minds qualified to judge upon the subject, we will endeavor, by a careful

analysis of the language used by the testator, to ascertain what he meant to do, and then give effect to his intention to the utmost extent permitted by well-settled rules of law.

By attaching the word "forever" to the gift of the personal property, and by the omission to use that or any word of equivalent meaning to the gift of the realty the testator may have intended to discriminate between the two gifts by making the one permanent and the other temporary. The intention to so discriminate is strengthened by the use of the word "occupy" in connection with the devise of the real estate, but it is weakened by the provision that the devisees may "dispose of" the same "as they may think proper." Two provisos follow in direct connection, qualifying or limiting the gift. By the first the testator directs that his wife and daughter Tasey shall have a comfortable home in the house. This operates as a limitation upon the gift to Harriet, so far as the house is concerned, by making it subject to the right of the other two devices to have a home therein. Such limitation is obviously confined to the life-time of the wife and Tasey, or to the period during which they would need or could use the house for a home. The remainder of the clause, to wit, "together with all the fuel, fruit, and other proceeds of the farm to which they will be entitled as joint owners," may be a part of the proviso or a part of the gift. If it is a part of the proviso, it does not appear to add to or take from the portion of any devisee, as the word "they" in that case would refer to the wife and Tasey, and the phrase would simply confirm the previous gift to them. If it is a part of the gift itself, the word "they" refers to the three devisees, and, while the effect would be a confirmation of the previous gift in part, by naming the products of the farm, it would also suggest that such gift was intended to be a life-estate. The term "joint owners," may refer to the devisees in either capacity as joint owners of the fee or of an estate for life. By the second proviso the testator directed that, in case Harriet should die without leaving any children, her portion of the estate should be equally shared by the other two devisees. If the reference to Harriet's share is for convenience of description merely, it throws but little light upon the main question; otherwise it would indicate that her share was a fee that he desired to make contingent upon her death without living issue. The land was devised "as above," subject to the payment of certain legacies "at or before the expiration of four years after the death of" both the testator and his wife, but without interest. He evidently intended by this clause to provide for ease in the payment of the legacies. While the devisees were not directed

to pay them, the devise was subject to the payment thereof by the executors, who, for this purpose, were doubtless trustees. As there is nothing in the will indicating an intention to give a life-estate to the wife, unless it was also the intention to give a life-estate to each of the other devisees, and as the legacies were not payable until after the death of the wife, it follows that, unless the devise was of the fee, her share of the devise was practically freed from any share in the payment of the legacies. Moreover, if the wife had happened to be the last survivor of the three, it is difficult to see how payment of the legacies could have been enforced at all unless the testator intended to give the land in fee. This clause, therefore, tends to support the contention that the devise was absolute.

The remaining clause of the will has no bearing upon the question presented for decision, except that the gift over to the wife, Tasey, and Harriet, of the bequest to Cornelia in case of her death without issue surviving, and in the event of Harriet's death, also without issue, to the wife and Tasey, when the legacy was not payable until after the death of the wife, indicates a want of clearness of perception on the part of the testator, and prepares one who studies his will to encounter inconsistencies. The codicil is expressly made a part of the will, and shows a change of intention with reference to the gift to the wife. As she had no property, the expression "all that may remain of the property of my wife," evidently refers to that given her by the will. If the reference to it is as to property vested in her under the provisions of the will as in Van Horne *v.* Campbell, 100 N. Y. 387; 3 N. E. Rep. 316, 771, the attempted gift over of that belonging to another would be void for repugnancy, according to all the authorities. But if it is referred to as the property of the testator, and thus mentioned for convenience of description, as in Norris *v.* Beyea, 13 N. Y. 273, 275, the gift would include that only which belonged to himself, and would indicate one of two results, — either a practical construction of the will as giving to his wife a life-estate in the real, and the use during life of the personal, property, or an intent to cut down the previous gift to her by limiting it in this manner. The expression "all that may remain," as applied to the personal property, would thus refer to that which had not been used up, and, as applied to the realty, to that which had been sold by the wife under the power of sale indicated by the words "dispose of" in the will, and "all that may remain" in the codicil. Wager *v.* Wager, 96 N. Y. 164, 170. By a proviso, which follows immediately, he refers to the property that his "wife should have at her decease;" but

whether he alludes to it as property that would then belong to his wife, or to that which he had not yet disposed of, is open to the same doubt as the former expression of similar import.

What did the testator mean by the will and codicil, taken together? For the purpose of construction, they should be regarded as one instrument, except that the making of the codicil eight years after the execution of the will emphasizes the change of intention. Westcott *v.* Cady, 5 Johns. Ch. 334; Willet *v.* Sandford, 1 Ves. Sr. 186; Schouler Wills, §§ 468, 487; 2 Jarm. Wills (5th Ed.), 840. We think that he intended to give his wife all that she wanted to use of the personal property, and all that she wanted to use of one-third of the real property, and upon her death the unused remainder of both to Cyrus Bray. His intention, as we gather it from his language, is the same as if he had said: "I give all my personal property to my wife, and all of my real estate to her and my daughters Tasey and Harriet, to occupy and dispose of as they think proper, but so much of my wife's part as may be left at her death I give to Cyrus Bray." Clearly, he did not intend to die intestate as to the portion in question, or that any third person should come in between his wife and Mr. Bray, and take any part thereof. He intended to give that part wholly to these two persons, and to no one else. If others are allowed to share in it, it will be contrary to his purpose as expressed in the will. Such being his intention, can effect be given to it? It is not so difficult to ascertain the substance of his desire as it is to discover the method by which he intended to accomplish it. If he intended to give one-third of the real estate to his wife absolutely, and upon her death the whole or a part of the same property to Mr. Bray, he undertook an impossibility, and the attempt must be held abortive, as the latter gift would be contradictory of the former, and void. But a will should not be so read as to contradict itself, if any other reasonable interpretation is possible. If it is capable of two constructions, one consistent and the other inconsistent with the law, the former will be preferred, as it is presumed that the testator intended to comply with the law. If a will and codicil are plainly inconsistent, the latter must control to the extent necessary to give it full effect, as the presumption in such a case is much stronger than in the case of a later clause in the same instrument. While a clear gift cannot be cut down by a doubtful expression, still, where a predominant purpose is apparent, but a doubt arises as to the method devised to effect that purpose, such a doubt should be so resolved as to accomplish the object of the testator

by presuming that he intended a legal, and not an illegal, method.

Applying these rules of interpretation, which are elementary, to the will and codicil in question, and bearing in mind that intention is the absolute criterion of construction as applied to wills, we are led to the conclusion, although with hesitation and difficulty, that the testator meant, by "all that may remain of the property of my wife," all that might remain of the property that he had provided for her use; that he did not mean to give to Bray property belonging to his wife, but property belonging to himself; and that he either construed the will as giving her a life-estate, or intended by the expression under consideration, in connection with the gift over to Bray, to effect that result. Otherwise the codicil, expressing his after-thought and latest intention, must go for naught, and that which he intended to give to Bray go to those to whom he intended to give nothing. While the language employed is not such as would be chosen by an experienced lawyer either to limit an estate, or to allude to one as already limited, an inaccurate use of words cannot be allowed to defeat the manifest intention to give to Bray what was left upon the wife's death. What could be left for him if all had been given to another? Yet something was intended to be left, either by withdrawing a part that had been given to the wife, or by construing the gift to her as not constituting a fee. If he had said, "Whereas, by my will I gave a life-estate to my wife with power to sell, now, by this codicil, I give that which may remain upon her decease to Cyrus Bray," his meaning would have been plain. While in the codicil, as written, he did not expressly characterize the gift to his wife, we think that he did so impliedly, and treated it as a life-estate by giving away the remainder. Moreover, the expression "all that may remain," by fair implication indicates that he intended that something would be left which he had not given to his wife, and hence could give to another. By fixing upon the death of his wife as the contingency when the gift to Bray should take effect, he also pointed out the nature of the provision for her, as he understood it. In fine, unless we mock the aged testator by reading his words as meaningless or unlawful, we must conclude that, by the will and codicil together, he intended to give a life-estate to his wife with power to sell and, upon her death, the remainder to Mr. Bray.

We regard this conclusion as sustained by the weight of authority, but it must be conceded that the decisions are not uniform. The cases are so numerous, and the language and schemes of the wills considered therein so varied, as to produce

confusion. It is believed, however, that they all unite in the effort to give the greatest possible scope to the dying owner's wishes, and that an apparent conflict arises from bending his words in one part of the instrument so that they will fit those used in another part, in order to accomplish this result. When the intent is ascertained, it is almost blindly followed. In Taggart *v.* Murray, 53 N. Y. 233, 236, the court said: "But in the construction of wills * * * the intention is to be ascertained by the consideration of the whole instrument and the construction is not to be made upon a single or isolated clause detached from its relation to those with which it is associated. If, on a comparison of the different provisions of a will, it is found to contain dispositions which are repugnant to each other, then it is the office of judicial interpretation to preserve, if consistent with the rules of law, the paramount intention of the testator as disclosed by the instrument, although in so doing it may defeat his purpose in some subordinate and less essential particular. It is, however, a primary rule in the construction of wills that effect is to be given, if possible, to all of its provisions, and no clause is to be rejected, and no interest intended to be given is to be sacrificed, on the ground of repugnancy, when it is possible to reconcile the provisions which are supposed to be in conflict. In accordance with this rule, it is held that subsequent clauses in a will are not incompatible with or repugnant to prior clauses in the same instrument, where they may take effect as qualifications of the latter, without defeating the intention of the testator in making the prior gift." Among the authorities cited in support of the language quoted is Norris *v.* Beyea, 13 N. Y. 280, 284, from which the following extract is taken: "But there is, in truth, no repugnancy in a general bequest or devise to one person in language which would ordinarily convey the whole estate and a subsequent provision that, upon a contingent event, the estate thus given should be diverted, and go over to another person. The latter clause, in such cases, limits and controls the former, and when they are read together it is apparent that the general terms which ordinarily convey the whole property are to be understood in a qualified, and not an absolute, sense." In Terry *v.* Wiggins, 47 N. Y. 512, the testator, after devising to his wife a piece of real estate "for her sole and absolute use and disposal," devised to her all his other real and personal estate, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same in part or in whole, if she should require it or deem it expedient to do so;" and, after her

decease, "whatever residue there may be of personal or real estate" he gave to a religious society. It was held that, by the second devise to the wife, she took a life-estate only, with a conditional power of disposal annexed, which did not operate to enlarge the estate to a fee, and that the limitation over was not repugnant, but valid. The decision rested upon the general scheme of the will, and the language was so construed as to reconcile the different provisions, and give effect to every part of the testator's purpose. In Wager *v.* Wager, 96 N. Y. 164, the testator, after a bequest to his wife, devised and bequeathed to his daughter, Susie, all the remainder of his real and personal estate, but directed that, if Susie should die before his wife, "all the property, both real and personal, that shall be left by my daughter at her death," should go to his wife. The wife survived the testator, and he survived his daughter. It was held that the gift to the wife, in case she survived the daughter, was not dependent upon the taking effect of the primary gift to the daughter; that while the language employed in making the latter gift would generally import an absolute estate, yet, as such a construction would render inoperative the limitation over, and would defeat the manifest intent of the testator, it was the duty of the court to so construe as to render the whole will operative, and to effectuate the intent, and that the widow was entitled to the whole estate. Referring to the claim that the provision for a remainder to the wife was void for repugnancy, the court says: "There are no words of inheritance or express language used in the bequest indicating an intention to give an absolute estate to the daughter, and such an intention is inferable only from the language used in constituting the remainder for the wife, which, by describing it as that part of the devised property to be left by the daughter at her death, leaves it to be implied that the power of disposing of it during her life was intended to be given to her. * * * The language of the provision under consideration expressly gives the property therein described to the wife solely upon the contingency of the death of the daughter, whenever that might occur, and we think that there is no language used in the will indicating an intention on the part of the testator to make this devise in any way dependent upon the taking effect of the first devise. The entire contention of the plaintiff is based upon an inference sought to be drawn from language used simply by way of description, and the attempt is thus made to destroy an estate, by an inconclusive inference, which the express language of the will attempted to create. * * * The controlling force, however, which has always been given to the intent of the testator, as ascertainable from the general scope and tenor of the instru-

ment, requires us to ascribe * * * inexactitude of expression, rather than such a meaning as will defeat the testator's intent. We are of the opinion that, although the language employed in making the devise to the daughter would generally import an absolute estate in the property, yet that creation of a limitation over, clearly intended to deny her the power of disposing of it by will, and the force of the testator's intention, as derived from the provision for a remainder in the wife, and the scope and design of its provisions generally, fairly imply an intention on his part to confer a life-estate only upon the daughter."

Much more of this opinion might be repeated as applicable to the case under consideration, including the comments upon Campbell *v.* Beaumont, 91 N. Y. 464. Out of the multitude of authorities that might be cited as applicable, we shall particularly refer to but one more (Smith *v.* Bell, 6 Pet. 68), in which the opinion of the court was prepared by Chief Justice Marshall. In that case, after a specific bequest, the testator gave to his wife all of his "estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, * * * for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of" his son. The court said: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. * * * These words [referring to the gift over to the son] give the remainder of the estate, after his wife's decease, to the son with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out, yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. * * * The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them. * * * But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them. * * * If this would be true provided the restraining words 'for her life'

had been added, why may not other equivalent words — others which equally manifest the intent to restrain the estate of the wife to her life — be allowed the same operation? The words, 'the remainder of said estate, after her decease, to be for use of the said Jesse Goodwin,' are, we think, equivalent. They manifest with equal clearness the intent to limit the estate given to her to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life." See also Colt *v.* Heard, 10 Hun, 189; Greyston *v.* Clark, 41 Hun, 125; Wells *v.* Seeley, 47 Hun, 109; Leggett *v.* Firth, 6 N. Y. Supp. 158.

The most, if not all, of the cases relied upon by the plaintiff, differ from that at bar in one or more of three particulars: (1) There was no specific gift over of the primary devise; (2) the gift over was by a later clause in the same instrument, if not in the same sentence; (3) the intent of the testator was not clear. We think that the judgment should be affirmed, with costs. All concur except Bradley and Haight, JJ., not sitting.

Remainder After an Estate During Widowhood.

Siddons *v.* Cockrell, 131 Ill. 653; 23 N. E. 586.

Appeal from circuit court, Peoria County.

Bill for partition, brought by Mary Siddons, Theodore O. Siddons, Jackson L. Gee, and Ida W. Gee, by her guardian, Jackson L. Gee, against Nancy M. Cockrell, Arcilus Cockrell, Abraham L. Hervey, Edward H. Hervey, Susan O. Nye, William Nye, Christiana Foster, Ellen Graham, Charles Cornwall, H. D. Broer, Tinna Mannott, Denny Short, Alfred S. Wilson, William Pullen and wife, James Pullen, and James P. Yates.

SCHOLFIELD, J. The second clause of the last will and testament of William Y. Hervey reads as follows: "I will, devise, and bequeath to my beloved wife, Nancy Martha, during and so long as she remains my widow, the net use and control of all the real estate and personal property of which I may die seised, wherever the same may be situated or found, for the purpose of herself and my children. Should she marry, from and after such marriage she shall have and control only one-third in value of the real estate, and one-third of the personal property then remaining, absolute. Should she survive all my children, they having died without issue, I will, devise and bequeath all my real estate and personal property to be hers, her heirs and assigns, forever. But in case of the death of my wife, leaving any of my children surviving, I will, devise, and bequeath to them

all of my estate in equal proportions, share and share alike; the heirs of any of my children taking their deceased parent's share. The personal property I devise in the same manner I have devised the real estate, and subject to the same order of distribution." The testator was the owner of several hundred acres of valuable lands, and of a large amount of personal property, at time of his death. His widow named in the will, and six children, survived him. After the death of the testator the widow married again. One of the children died in infancy, and before the subsequent marriage of the widow. Another one of the children married, had a child, who is still living, born to her, and after the birth of such child, and the subsequent marriage of the widow, conveyed to another her interest in the testator's real estate, and thereafter died intestate. The other children are still living.

The questions before the court below were: (1) Does the widow take a fee or a life-estate, after her marriage, in the one-third then given her in the real estate? (2) Was a fee vested in the children which could pass by descent immediately upon the death of the testator? The court below found that the widow took a life-estate only in one-third of the real estate, after her marriage, and that a fee was vested in the children immediately upon the testator's death, which passed, upon the death of the child dying in infancy, and before the subsequent marriage of the widow, to the heirs at law of such child. The appellant contests the first of these rulings and these appellees who are children of the testator contest the last. The other appellees insist upon the correctness of both rulings.

1. Counsel for appellant argue that by the use of the words "from and after such marriage she shall have and control only one-third in value of the real estate and one-third of the personal property then remaining, absolute," the testator clearly intended to vest a fee in the real estate in his widow; that "have" means ownership: "from and after," being unlimited or qualified by other words, mean "thenceforth forever;" and that "absolute" refers to both the real and the personal estate, and, applied to the real estate, means a fee-simple, in contradistinction to a life-estate. If nothing but these words were to be considered in connection with the devises, there would be much force in the argument. But the familiar rules of construing wills require, if it can be necessarily given, such a construction as shall give force and effect to every word and clause, and, if a prior and a subsequent clause are repugnant, that the prior clause shall be restrained or modified by the subsequent clause. Walker *v.* Pritchard,

121 Ill. 221; 12 N. E. Rep. 336. It will be observed that, in clauses subsequent to that referred to and relied upon by the counsel, the testator assumes to devise all of his real estate in fee to his children or to his widow. It is, of course, impossible to give one-third of his real estate in fee to his wife, and all of his real estate in fee to his children; and yet the word "all," in this connection, is unqualified, expressly or impliedly, by any modifying word. But a devise of land, without the use of the word "heirs," or other words necessary at common law to pass a fee, is only to be construed as a devise of a fee when it does not appear from the entire will that a less estate was intended (Walker *v.* Pritchard, *supra*); and since it could not have intended to devise by the subsequent clause what was devised by the prior clause, and the language of the subsequent clause has preference in determining what is devised by that clause, it must have been intended by the first clause to devise a life-estate, as between a devise of which, and of a fee in the same land, there is no necessary repugnance. It will also be further observed that the testator in the first clause uses the language, "she shall have and control," but in the subsequent clause he uses the language, "devise and bequeath all my real estate, * * * to be hers, her heirs and assigns, forever." This change of phraseology plainly shows that what was intended by the latter was different from that intended by the former, and that the testator knew, and had in his mind at the time, what language to use to devise a fee so that his meaning could not be misunderstood. The meaning of the word "absolute" in the connection in which it occurs, in our opinion, has reference to the personal property only, and was not intended to be descriptive of the real estate.

The widow might, had she so elected, have renounced under the will, and have taken the interest in the testator's estate that she would have taken had he died intestate, namely, dower in the lands (section 1, c. 41, Rev. St. 1884), and, "as her absolute personal estate, one-third of all the personal estate" (clause 4, § 1, c. 39, Rev. St. 1874). And it is fairly to be inferred that the testator intended that if his widow married again she should have only what she would have taken under the law if he had made no will, or what she would have taken under the law by renouncing under his will, and in spite of his will. Such provisions are presumably intended to discourage rather than to invite subsequent marriages; and it would therefore be unreasonable to assume that the word "absolute" was here intended to express the idea of a conveyance of real estate in fee so long as any other rational meaning can be assigned to it.

There is another view that we think might well be taken of the intention in using that word. The use and control given of the property devised before subsequent marriage is expressed to be for the support of the widow and the testator's children, but the property given to her afterwards is for herself alone; and so the word "absolute" may reasonably be held to express that idea,—the unrestricted, *i. e.*, absolute, use by the widow, for herself, in contradistinction to the former joint use, for herself and the testator's children. The words "from and after" imply futurity, "indefinitely," simply, and are clearly restricted by the purpose of the devise as manifested by the entire will.

2. In the absence of a clearly manifested intention to the contrary, it must be presumed that the testator intended to dispose of all his estate. So, also, the heir at law is not to be disinherited unless the intent to do so is very clearly expressed. 1 Redf. Wills, § 18, p. 434. The devise of the use and control of the real estate being in effect a devise of the real estate itself, the devise in the first instance was of a life-estate, determinable, however, as to two-thirds thereof, upon the subsequent marriage of the widow (1 Prest. Est. 442); and there was a reversion still left in the testator to be devised (Tied. Real Prop., § 386; State *v.* Brown, 27 N. J. Law. 20; McKelway *v.* Seymour, 29 N. J. Law, 329). The devise of the reversion in the two-thirds of the real estate, in the event of the subsequent marriage of the widow, would therefore have to take effect immediately upon such marriage; and we must assume that the testator intended that it should then take effect. But there is nothing in the language of the will that warrants the conclusion that the title devised was intended to be vested at different times, although the enjoyment of one-third of the estate is postponed until after the death of the widow The will should therefore be read as follows, after the devise to the widow: "I devise all my remaining real and personal estate to my children; and if any children be dead, leaving children surviving them, then to them, also, the children of a deceased child taking the part of their parent. But if all my children shall die, without issue, before my wife shall die, I devise the same to her." The estate devised is clearly intended to be a fee-simple in whomsoever shall take. The title was intended to vest immediately upon the death of the testator, and so, necessarily, he must have intended children or children's children in being at his death; and the deaths contemplated were necessarily deaths in the life-time of the testator. Briggs *v.* Shaw, 9 Allen, 516; Fulton *v.* Fulton, 2 Grant Cas. 28; Moore *v.* Lyons, 25 Wend. 119; Freeman *v.* Coit, 96 N. Y. 68. We find no error in the record. The judgment is affirmed.

Future Estate Subject to Life Estate Reserved to Grantor Held to Be a Vested Remainder.

Hitchcock *v.* Simpkins, 99 Mich. 198; 58 N. W. 47.

HOOKER, J. The complainant's bill was filed for the foreclosure of a real estate mortgage for $60 given by Abraham Percival to William Snowden on February 1, 1883, and by Snowden assigned to the complainant. The bill alleges that on January 29, 1881, said Percival executed and acknowledged a deed of said premises to his son, Richard W. Percival, which was subject to certain provisions and conditions therein contained, under which deed defendant Simpkins claims title by purchase from the younger Percival, and Brown is a subsequent mortgagee from Simpkins. The bill states, further, that the deed from Abraham Percival was voluntary, and was not accompanied or followed by a change of possession until after the death of Abraham Percival; that it was testamentary in its character, and passed no title. It is also alleged that these defendants are not purchasers in good faith.

The proofs show that on January 29, 1881, Abraham Percival lived upon the premises with one Elizabeth Armstrong, whom he boarded and clothed for her services as housekeeper. Richard W. Percival was his only child, and he was living abroad. He aided his father by contributions of money, and in 1880 he spent some time at Pontiac, and made an arrangement to pay him $100 a year, upon condition that his father should give him a deed of the place. The deed was executed, and contains the stipulation agreed upon. It was an ordinary warranty deed, with the following language inserted immediately after the description of the premises, viz.: "Subject, however, to the following payments, conditions, limitations, and uses, to wit: First. The said party of the first part is to remain in the full possession, control, and occupancy of said above-described lands for and during the period of his natural life, enjoying the same, together with the rents and profits arising therefrom, as fully and freely as though this deed had not been executed. Second. That said party of the second part will pay or cause to be paid, to the party of the first part, the sum of one hundred (100) dollars each and every year for and during the remainder of the natural life of the said party of the first part, which he hereby agrees to do. But at the death of the said party of the first part the title shall be, and is hereby declared to be, in the said party of the second part, subject to the further limitation [then follow like provisions as to Mrs. Armstrong, providing she continued to his decease as his house-

keeper]. Fourth. That in case the said party of the second part shall refuse or neglect to pay, or cause to be paid, said sum or sums of money, as aforesaid, or to perform any and all the conditions hereinbefore mentioned, then and in that case this deed shall be null and void; otherwise to be and remain in full force and effect." This deed was duly recorded before the execution of complainant's mortgage. The annuity of $100 appears to have been regularly paid. It is shown that on February 1, 1883, Abraham Percival borrowed $60 from Snowden, giving the mortgage sought to be foreclosed. Snowden and another say that he said at that time that he had been disappointed in getting some money that he had expected from his son. Snowden went to the register's office, and was told that the title was "All right," and closed the transaction. In May, 1883, he was paid $25 upon the mortgage by the mortgagor. He kept it until 1890 without effort to collect, so far as appears, and then assigned it to complainant. Early in 1880, Abraham Percival died, this event having been preceded by the death of Mrs. Armstrong. Richard W. Percival went into the possession upon the death of his father, and subsequently sold the premises to Simpkins, who mortgaged to Brown for $800, using the money to build upon the premises.

The appellant's counsel contends that the instrument given by Abraham Percival to his son was inoperative to convey title, and was no more than a devise, subject to revocation by the deceased, and that the complainant's mortgage revoked it. The test is the time when the instrument was designed to take effect. If it conveyed a present interest though of a future estate, the title was vested. If, on the contrary, it was to take effect only at the death of the maker of the instrument, it was testamentary in character, and could only operate as a will, if of any force at all. In the language of a writer upon wills: "If a man, by deed, limit lands to the use of himself for life, with remainder to use of A., the effect upon the usufructuary enjoyment is precisely the same as if it should, by his will, make the immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question, for in the former instance A. immediately on the execution of the deed becomes entitled to the remainder in fee, though it is not to take effect in possession until the decease of the settler, while, in the latter, he would take no interest until the decease of the testator should have called the instrument into operation." Jarm. Wills, p. 18, and cases cited; Schouler, Wills, §§ 265, 266, and notes; Habergham *v.* Vincent, 2 Ves. Jr. 230; 19 Cent. Law J. 46, 47; Leaver *v.* Gauss (Iowa), 17 N. W. 522;

Turner *v.* Scott, 51 Pa. St. 132; Sperber *v.* Blaster, 66 Ga. 317. The present case must turn upon the effect of the words, "But at the death of the said party of the first part the title shall be, and is hereby declared to be, in said party of the second part, subject, however, to further limitation," etc. It is contended that these words indicate an intention that no title should vest in the son until the death of his father. Among the many authorities cited by the counsel for the complainant are three Michigan cases, which we think in harmony with the rule stated. Bigley *v.* Souvey, 45 Mich. 370, may be passed with the remark that the deed in question states that "the conveyance of land herein named shall be and continue the property of the first party during his lifetime, and the remainder to said second party immediately at the death of said first party." In Re Lautenshlager, 80 Mich. 285; 45 N. W. 147, a deed was admitted to probate as a will, and the judgment was affirmed upon the finding of fact that it was to become operative at death. In Schuffert *v.* Grote (Mich.), 50 N. W. 657, a deed was made and delivered to a son with the remark that the father wished him to have the lots described after his death. It was immediately handed back to the father, who kept it for a couple of years, and then destroyed it. It was held that the title did not pass, and that it was subject to revocation by destruction. None of these cases go further than to hold that, where the title does not at once vest, the instrument is subject to revocation. In the present case the deed was based on a valuable consideration, the payment of which was made one of the conditions. The deed was delivered and recorded, and remained in the hands of the grantee, who performed all the conditions required by the deed so far as this record shows. While it is true that the mortgagee testified that Abraham Percival said, at the time he made complainant's mortgage, that he had been disappointed in getting money from his son, he did not say that it was due by the terms of this deed, and this testimony was hearsay at best. Complainant makes no such point in his brief, and, if he did, there is no proper evidence to support it. The deed contains the language usual to a present conveyance, and all the circumstances show that the intention was to place this property where it would be secured to the son, who assumed the burden of the support of his father and the housekeeper. We think that the language mentioned was not designed to defer the time when the title should vest, but that the son took a vested remainder subject to the condition mentioned. Had the grantor intended this as a testamentary disposition, a slight change in the language used would have expressed it. We think it more

reasonable to hold that these words meant that at death the son's estate should become complete, except as it was by that claim further subject to an obligation to provide for the housekeeper if still living. The deed, being on record, was notice to the world of the son's rights, and complainant's mortgage must yield to his superior title. The decree of the circuit court, dismissing the bill, will be affirmed with costs. The other justices concurred.

NOTE. — The future estate, described in the case of Hitchcock *v.* Simpkins, would, at common law, and independent of modern law, be more properly described as a springing use, executed into a legal estate by the statute of uses. Indeed, in no other way could such an estate be validly executed, independently of the statute, and since the deed in the present case could operate as a conveyance under the statute of uses, a *covenant to stand seised* or a bargain and sale, the practical result of the decision was correct.

Remainder to a Class When Contingent.

Coxey *v.* Springer, 138 Ind. 506; 37 N. E. 506.

DAILEY, J. This action involves the construction of the last will of Gabriel Springer, deceased. Said Gabriel Springer died testate in 1871, leaving as his only heirs at law his wife, Hannah Springer, his son John J. Springer, and his two daughters, Nancy J. Miller and Sarah Bromlett. John J. Springer died testate, in Rush County, Ind., on December 25, 1891, leaving neither wife nor issue surviving him. Nancy J. Miller died, leaving Oscar Miller and Roy H. Miller, her only children and heirs at law, surviving. Sarah Bromlett died, leaving her children, Perry F. Bromlett, Wesley F. Bromlett, and Jesse T. Bromlett, defendants herein, surviving. The widow, Hannah Springer, still survives, and since testator's death has remained unmarried. The appellant, as executor of the last will of John J. Springer, deceased, filed his petition in the Rush circuit court to sell certain real estate embraced in the will of Gabriel Springer, deceased, to pay the debts of the testator John J. Springer, to which petition the appellees are parties defendant. The defendants Oscar Miller and Roy H. Miller, by their guardian *ad litem* William J. Hanley and Perry F., Wesley F., and Jesse T. T. Bromlett, by their guardian *ad litem*, Lot D. Guffin, have filed their answers thereto, setting up the will of said Gabriel Springer. The controversy which arises upon demurrer to the answer is, what was the nature of the estate devised by said Gabriel's will to John J. Springer,

appellant's testator? The items of the will which call for construction are the third and fourth. They are as follows: "Item Third. It is my will, after the payments aforesaid are made, and after the expenses of administration are all paid, that my wife, Hanna Springer, if she shall survive me, and remain my widow, shall have the use of all the remainder of my estate, both real and personal, during her lifetime, and I accordingly bequeath the same to her as aforesaid, to be kept and used by her, during the time of her natural life, if she so long remain my widow; but, in case of her marriage after my decease, this provision of my will to be void and to be of no effect, and in that case I desire that she take out of my estate, real and personal, only such provision as the laws of the State of Indiana make for widows at the time of my death. Item Fourth. At the death of my wife, if she shall not marry again, I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be. In case my wife should again marry, and so take the provision herein made for her, in that event, under the law of Indiana, I bequeath the remainder of my estate, real and personal, to my children, and to the representatives of such as may be dead, if any, as provided in the former part of this will." As we understand the contention, appellant insists that by the terms of the will the widow, Hanna Springer, took an estate for life in the lands in controversy, and that a remainder in fee vested in Gabriel Springer's children, of whom John J. Springer was one, and that such remainder in fee vested absolutely and unconditionally in said John at the time of his father's death. Appellees assume, upon the contrary, viewing the matter aside from the attempted limitation concerning or with respect to marriage, that, after carving out a life estate for his widow, it was the manifest intention of the testator, by the terms of his will, to give to his children living at her death, and to the descendants of such as were then dead, a vested remainder; that the testator appointed a fixed time when the conditional fee should ripen into an absolute fee in his children — a time when the division or distribution, as he styles it, should take place, — and that time was fixed at the death of the widow. As opposed to the theory that John J. Springer took an absolute, unalterable, and unconditional fee at the time of the testator's death, it is maintained by the appellee that the remainder over to him at the time of the testator's death was only in the nature of a vested remainder; that it was alterable, conditional, and limited; and that the

time fixed by the testator himself for its ripening into a certain and absolute fee simple was at the event of the widow's death. In our opinion the controversy in this case does not depend upon a solution of the question whether the remainder to the son was a vested or a contingent one. It is not contended by the appellees that the remainder to him was contingent in the technical sense of the term. The test as to whether an estate is vested or contingent is this: "The right and capacity of the remainderman to take possession of the estate if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainder-man, determine whether or not the estate is vested or contingent." Bruce *v.* Bissell, 119 Ind. 525, on page 530; 22 N. E. 4, citing Croxall *v.* Shererd, 5 Wall. 268; Tied. Real Prop., § 401. These authorities establish the doctrine that an estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. "It is the uncertainty of the right that renders an estate contingent, and not the uncertainty of the enjoyment." Wood *v.* Robertson, 113 Ind., on page 325; 15 N. E. 457. In the construction of wills it is a familiar rule that the intention of the testator must prevail. Wood *v.* Robinson, 113 Ind., on page 326; 15 N. E. 457. The fundamental rule in the construction of wills is that the intention of the testator, if not inconsistent with some established rule of law, must control. Jackson *v.* Hoover, 26 Ind. 511; Butler *v.* Moore, 94 Ind. 359; Nading *v.* Elliott (decided by this court on March 6, 1894), 36 N. E. 695. Courts, in giving an interpretation to a will, may place themselves in the situation of the testator, examine the surroundings, and then, from the language used, arrive at his intention. Jackson *v.* Hoover, 26 Ind. 511; Price *v.* Price, 80 Ind. 90.

In the light of these rules it is proper to consider the language employed by the testator, and ascertain its force and significance. Aside from the provisions made in the event of the widow's marriage, the third item in the will devises an estate for life to his widow. The fourth item then reads: "At the death of my wife, I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be." Here the testator in language clear and unmistakable as could be employed, fixes the time for "such distribution" or final disposition to occur, viz, "At the death of his widow." Until this event shall happen, he holds the fee conditional and in abeyance, subject to alter-

ation, and only to ripen and fasten absolutely in his children surviving at the death of his unmarried widow. Appellant's counsel state the rule correctly, that, "The law favors vested estates, and remainders will never be held to be contingent when they can consistently with the intention of the testator, be held to be vested. Words of survivorship, generally, in the absence of an expressed or implied intention to the contrary, are construed to refer to the testator's death." Boling *v.* Miller, 133 Ind. 602; 33 N. E. 354; Davidson *v.* Bates, 111 Ind. 391; 12 N. E. 687; Harris *v.* Carpenter, 109 Ind. 540; 10 N. E. 422; Davidson *v.* Koehler, 76 Ind. 398; Bruce *v.* Bissell, 119 Ind. 525; 22 N. E. 4. But the converse is true, — that, where there is an expressed or fairly implied intention to the contrary, the law will carry into effect the evident purpose of the testator; and where the testator fixes the time, by expressed or fairly implied intention, for the distribution of his estate to his children, at the death of his widow, the law will uphold his purpose and intention. Wood *v.* Robertson, 113 Ind. 323; 15 N. E. 457. A conditional fee may be created by a will as well as by a deed. It is by no means uncommon to affix conditions to a devise; and a less estate may be granted, to continue until the happening of a prescribed event, then to enlarge into an absolute fee. Shimer *v.* Mann, 99 Ind. 190–198. It is evident in this case that John J. Springer, by the terms of the will, took a conditional fee; that his estate in expectancy was to enlarge and ripen into an absolute fee at the death of the widow; that, he having died prior to that event, his estate was a defeasible one, which had been defeated; and there remains no interest which the appellant, as executor, can seize upon or sell by the order of the court to pay his debts. A will ought to be so construed as to give effect to all its provisions, and make it a harmonious whole. Jackson *v.* Hoover, 26 Ind. 511; Cooper *v.* Hayes, 96 Ind. 386; Wood *v.* Robertson, 113 Ind., on page 326; 15 N. E. 457; Nading *v.* Elliott, *supra;* Brumfield *v.* Drook, 101 Ind. 190. In this controversy between the parties it is the contention of the appellant's counsel in their reply brief that the will must stand as if there was no provision with reference to the widow; that those provisions are in restraint of marriage and void, under section 2567 Rev. St. 1881; Burns' Rev. St. 1888, § 2737. As the widow, Hanna Springer, is still living and unmarried, and John J. Springer departed this life without issue, no question is presented for our consideration as to whether the devise and bequest contained in the will concerning the widow's interest if she should marry are limitations of the estate merely, or conditions in restraint of marriage, within the meaning of the statute.

If the question were before us, it would be easy of solution. In 4 Kent Comm. 126, the distinction is defined between words of limitation and words of condition as follows: "Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event which, if it takes place in the course of that time, will defeat the estate." We find no error in the record. The judgment is affirmed.

Cross-Remainders.

McGee *v.* Hall, 26 S. C. 179; 1 S. E. 711.

SIMPSON, C. J. David Hall died testate in 1860. In the third clause of his will he devised two tracts of land, containing 784 acres, more or less, to his three youngest sons, Absolam J. Hall, John M. Hall, and William C. Hall, as follows, to wit: "To be divided equally between them in value, the issue of any of my sons who may be dead to take the share of the parent; and if either of them should die without issue at his death, then his or their shares in said land to go to the surviving brothers or their issue as above." Shortly after the death of the testator, the land was surveyed and divided; 340 acres being allotted to William C., 212 to John M., and 313 to Absolam J. William C. was killed in battle in 1863, being intestate and unmarried, whereupon his 340 acres went under the limitations in the will to his two surviving brothers John and Absolam, and soon after this, and during the same year (1863), John died, also intestate and unmarried, leaving Absolam the sole surviving brother, who took possession of the entire land, including the half of the 340 acres which had accrued to him on the death of William. Absolam sold the half of the 340 acres which had accrued to him on the death of William, to a third party, but retained the other half upon the death of John, until in 1871, when he mortgaged it to one O. H. P. Fant. This mortgage was foreclosed in 1879, and the land was sold under the foreclosure judgment to Mrs. E. C. Bell, who conveyed the same to the defendant, Lemuel Hall.

The plaintiffs and the defendants, except Lemuel Hall, are the heirs at law of John M. Hall, and they brought the action below to have the 175 acres, accrued to John from William, partitioned between them, claiming that John had an absolute estate therein

under the will of his father. The defendant, Lemuel Hall, resisted the partition — *First*, on the ground that the accrued interest was governed by the limitations attached to the original share, and therefore the plaintiffs had no title; *second*, he interposed the statute of limitations; *third*, he invoked the doctrine of estoppel; and, *lastly*, he claimed that plaintiffs were barred by laches.

His honor, I. D. Witherspoon, sustained the construction of the will claimed by the plaintiffs, and overruled all of the other defenses set up by Lemuel Hall, and referred the case to the master to have the land partitioned according to the interests of the parties, allowing Lemuel to have the share of Absolam therein, as an heir at law of John M. The appeal renews here the questions raised before the circuit judge, to wit, the proper construction of the will as to the accrued share (175½ acres) of John in the original share of William; (2) the statute of limitations; (3) the estoppel; and (4) laches.

As was said by the circuit judge, intention should always govern in the construction of wills, for the reason that one who has become possessed of property during his life by his industry, labor, or otherwise, has the right to dispose of it after his death as he sees proper. This is one of the fundamental rights of the citizen and one which the courts will always protect. This intention, however, must be reached by the application of those rules of construction which have been established as best adapted to evolve said intention, and by the principles which have been applied by the courts in analogous cases. Intention reached in any other way (as by considering what would be abstractly just to the parties, and what in the opinion of the court the testator ought to have done, etc.) is not allowed because such a course would often defeat the very object intended to be accomplished, to wit, the real intention of the testator.

The first and most important rule is the language of the will — what has the testator said? and what do the words used mean, interpreted according to their usual and ordinary signification? The testator here has said: "I devise the land to be divided equally in value between my three sons." There is no ambiguity about this and had he stopped here each of the sons would have taken an absolute indefeasible estate; the word "heirs" not being necessary in a devise to convey the fee. Next, "the issue of my said sons who may be dead, to take the share of the parents." This is equally as unambiguous as the first provision. It simply declares that if either son shall die before his death, leaving issue, said issue shall take an absolute estate in the share intended in the first

instance for the parent. Next, if either son should "die without issue living at his death, then his share in said land to go to the surviving brothers, or their issue as above." This seems quite unambiguous also, if the plain meaning of the words is allowed to control. Having provided for the contingency of a son being dead leaving issue, and remembering the possibility of a son dying, leaving no issue, he provides for that event, and how? By directing that the share of said son should go to the surviving brothers, or their issue, as above. Now, this last clause is the clause which controls the accrued share. It supposes that each of the sons has taken an original share — in other words, has taken a fee — in one-third in value of the land, and this clause defeats said fee upon the contingency of said son dying, leaving no issue at his death; in which event said share is to go to the surviving brothers, or to their issue as above.

Now, how had the shares gone to the brothers or their issue above? The term "above" refers to the clause above the one in which it is found. That clause directs the land to go to the sons absolutely, if they be alive, and, if dead, to their issue absolutely. It is the last clause — the one in which the term "above" is found, and of which it is a part — that defeats the fee already given upon the contingency of a son dying, leaving no issue — dying after he had obtained the fee. Under this last clause, in the event that a brother died after the original division, leaving no issue, then his share went to the surviving brothers, or to their issue in case they were then dead, and it went to them in fee. This being so, what is to divest or defeat that fee? There are certainly no express words to that effect in the clause itself; no direction that, in the event of the brothers dying after this, they become invested in fee with the accrued share of a deceased brother, but said accrued share should go to another — nothing of the kind. Nothing is claimed as indicating such intent, but the term "above," which, as we have shown, refers entirely to the previous clause in which the original shares are disposed of.

We think the circuit judge construed properly the third clause of the will, when considered in itself, taken as a whole, as examined in its separate parts, so far as the language employed shows intention. Does this construction conflict with the principles established in any of our decided cases? The appellant relies on Lowry *v.* O'Bryan, 4 Rich. Eq. 262, and Hill *v.* Hill, 1 Strob. Eq. 22. We suppose that these are the strongest cases in the direction contended for by appellant. At least no others have been cited; and we have not found any other in our examination of the reports.

The case of Lowry *v.* Bryan, as it appears to us, fails to support the appellant. In fact, it does not touch the question here. It simply decides that, in a bequest of personalty "to four sons, to them and their heirs forever, if either should die without issue, his part should be equally divided between the survivors;" that the share of the last survivor could not be defeated by his dying without issue simply. Because one of the contingencies was that it should go to the survivor, and their being no survivor of the last, there was no defeasance of his absolute estate. Two of the sons had died without issue, and their shares had been divided equally between the survivors. Then William died, leaving issue; and, many years afterwards, Charles, the last survivor, died without issue, and the administratrix of William claimed the property. The court held that she should have no higher rights than her intestate, and that his interest in the share allotted to his brother, Charles, depended upon two contingencies, to wit: that he (Charles) should die without issue, and that he (William) should survive him. But William had been in his grave 30 years before the death of Charles; consequently he took nothing as survivor. The question as to the accrued interest was not adjudicated or raised.

The case of Hill *v.* Hill, *supra*, is directly in support of the construction contended for by respondents, and as given by the circuit judge. There, personal property (slaves) had been donated to several persons (four children of the grantor), with a limitation to survivors, in the event of the death of either without issue. One died without issue, and his portion was distributed among the survivors; and then a second died. It was held that the proportion of the first, accruing to the second by survivorship, did not go over to the remaining survivors upon the death of the second without issue; but that it became the absolute property of the second, which is the very case here. It is true, in that case, Chancellor Harper said that, according to the English law, where property is given to several jointly, the property will vest in the surviving joint tenants successively, so that the whole may become vested in the last survivor. But that doctrine cannot apply here, because it is evident that the testator did not contemplate a joint tenancy. It is true, he gave the land in bulk; but he directed an equal division in value, — one share each to go to his sons in severalty, — which division was made at once, and each son at his death was in possession of his allotted share.

We have already discussed the word "above," and we do not think the case of Meredith *v.* Meredith, 10 East, 503, can give it the effect contended for by appellant.

The next question is the statute of limitations. Can it protect the defendant under the facts of the case? It is conceded that some of the plaintiffs are not barred, because of minority. Will the minority of these protect the others? This, too, is conceded as a general rule. But it is contended by appellants that this applies to cases of cotenancy; but, where the possession of the defendant is adverse and exclusive to all the world, the protection afforded by the statute to such claimants as may be minors cannot be extended to those who are not under such disability. The possession of one tenant in common is the possession of all, as a general rule; and the possession of the one cannot defeat the rights of the others, unless there has been an ouster, at which time the statute would begin to run as to all ousted, the minority of any of these protecting the others. Here Absolam Hall was in possession, after the death of his brother, John M., in 1863, until 1879, when the sale took place under the foreclosure of the mortgage, which he had given in 1871 to Fant. True, he supposed he was the absolute owner, by virtue of his survivorship; but this turns out to have been a mistake, and his only right to possession was as one of heirs at law to his brother, John. This made him a tenant in common with the other heirs, plaintiffs, and defendants here. Has he, by any act of his during this possession, ousted the plaintiffs, and held since adversely, long enough to interpose the statute as to these minors? If not, he cannot interpose it as to any; the shield of the minors being a shield to their co-tenants. Lahiffe *v.* Smart, 1 Bailey, 192; Faysoux *v.* Prather, 1 Nott & M. 298.

Was there an ouster? Ouster is generally a question of fact; or, rather, whether an ouster has taken place is a question of fact; and in a decided exclusion by one of another, under a claim of right, there is no difficulty; but there is no case which has adjudged the facts necessary to ouster, so that every case may be measured thereby. It has, however, been held that the mere possession of the land for a period short of 20 years will not presume ouster. Gray *v.* Givens, 2 Hill Ch. 513. Chancellor Harper said in that case: "No doubt an ouster may be presumed from the mere fact of a very long possession, as in the case of Fishar *v.* Prosser, Cowp. 217. And in a case where one tenant in common had been in possession exclusively, receiving the rents and profits for about 40 years (double the time for the English statute to run), Lord Mansfield instructed the jury that, from the length of possession, they might presume an ouster. Chancellor Harper adopted the rule of 20 years, in analogy to the principle that 20

years would generally presume almost anything to quiet titles and possession. Even if this rule is applied, it cannot avail the defendant, because he held only some 16 years. John M. died in 1863, when Absolam took possession; the land was sold under his mortgage in 1879, when Mrs. Bell bought, from whom the defendant purchased; so that Absolam was in possession some 16 years. The only evidence, then, of ouster on the part of Absolam is 16 years' possession, and the enjoyment of the rents and profits during that time, which, under Gray *v.* Givens, is not sufficient. It is claimed, however, that the mortgage of 1871 was an ouster, under the principle stated by Chancellor Harper in Gray *v.* Givens, *supra*, where he says "that whatever is sufficient to give the co-tenants notice that the party in possession claims exclusively for himself, and in his own right, will, I think, be a sufficient ouster." Admit this, yet at that time several of the plaintiffs were minors and their disability did not cease in time to allow the statute to be interposed. Now, being protected themselves, the rights of all the heirs were saved. And, in any event, whether there be ouster or not, the rights of the minors were not lost, and, under their wing, the other heirs are protected.

Next, as to estoppel. It is hardly necessary to refer to authorities as to what constitutes an estoppel. It is sufficient to say that we do not think the facts of this case are sufficient to enable the defendant to invoke that principle in his defense. We see nothing but acquiescence, and hardly that, because it is clear that the parties were ignorant of their rights, many of them were minors, and they simply failed to assert or claim an interest in the land. They, however, did no positive act calculated to mislead Absolam, or which induced him to do anything to his injury.

The last defense is the alleged laches of the plaintiffs. Laches may be regarded as an equitable statute of limitations, and is appli d to equity causes in analogy to legal statutes applied to causes at law. And, generally, when a party would not be barred at law, he would not be barred in equity. This case, being originally a complaint for partition, was brought in the equity side of the court. The defendant, however, raised a question of title, and an issue was ordered as to that question to a jury; and had that issue been tried before a jury, the legal statute of limitations would have been relied on, and the rights of the parties would have been determined by the law governing said statute. The jury trial, however, seems to have been waived, and the entire case was tried by the judge. We have already adjudged that the legal statute cannot avail the defendant, as to the ques-

tion of title, and we see no ground for the interposition of the doctrine of laches as to the partition.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

Alienation of Contingent Remainder.

Foster *v.* Hackett, 112 N. C. 546; 17 S. E. 426.

Action by John R. Foster and others against Siddia Hackett to recover land. Plaintiffs obtained judgment for a five-sixths interest in the land. Defendant appeals. Reversed.

Avery, J. Both plaintiffs and defendant claim through Mildred Goforth, who devised the land in controversy to Achilles Foster, in trust for her daughters Anna D. and Pheba Goforth, or to the survivor, for life, with remainder to the issue of both or either, but, on failure of such issue at the time of the death of the survivor of the two, to her "own lawful heirs." Mildred Goforth left, surviving her, eight children, viz.: Anna D., who died without issue in 1885, and Pheba, who died without issue in 1887, and six others, who married, and are now living, or have left children who are still surviving, viz.: John Goforth, William Goforth, Mildred, who married Edward Tilley, Delphia, who married Wyatt Rose, Lucy, who married Anthony Foster, and who was the mother of the plaintiffs, and Levinia, who married ——— Foster. James Calloway, the executor of Mildred Goforth, assuming that he had power under the will, or as attorney for her heirs and devisees, sold and conveyed the land in dispute on the 28th day of June, 1858, while Anna D. and Pheba were living, to the said Levinia Foster, — one of the daughters of the testatrix. The defendant claims under a deed from Levinia Foster dated October 6, 1871. It was admitted on the trial that James Calloway had no power under the will to dispose of the land, and no instrument was shown, constituting him the agent of the heirs and devisees of Mildred Goforth, or any of them, for that purpose. So, if we concede that the deed of Levinia to the defendant precluded her or her heirs, if she is now dead, from setting up any claim to the interest which vested subsequently to the date of her deed or the death of Pheba, in 1887, in the "lawful heirs" of Mildred Goforth, the title to one undivided sixth, only, of the land in controversy was shown to be in the plaintiffs, while the other four undivided sixths are vested in John Goforth, William Goforth, Mildred Tilley, and

Delphia Rose, or their heirs — one-sixth in each. The plaintiffs have not excepted, but seem to have conceded that the defendant, as the grantee of Levinia Foster, is a tenant in common with the other heirs of Mildred Goforth, holding her undivided sixth interest.

Though the rule has been repudiated in many of the States, it seems to be settled in North Carolina that in actions for the possession of land, where a plaintiff proves his title to an undivided interest, he can have judgment for the whole, if he has shown "on the trial that the same evidence of title or possession that established his own right demonstrated the fact that others than the defendant held as cotenants the other undivided interest, and that the action inured to their benefit." Allen *v.* Salinger, 103 N. C. 18; 8 S. E. Rep. 913; Sedg. & W. Tr. Title Land, § 300. The rule is stated by Sedgwick and Waite as follows: "Each cotenant can pursue his remedies independent of the others, and may maintain ejectment or trespass to try title alone, and in many States may recover the entire premises and estate from trespassers, strangers, wrongdoers, and all persons other than his cotenants, and those claiming under them. When his right is recognized, he recovers for all. This principle has been expressly recognized in Oregon, Nebraska, Nevada, North Carolina, etc. * * * But the rule has been repudiated in Massachusetts, Pennsylvania, and Missouri." Where, in the old declaration in ejectment, the demise was laid from one of several tenants in common, the plaintiff could recover his term in the undivided share of that particular tenant (Godfrey *v.* Cartwright, 4 Dev. 487; Holdfast *v.* Shepard, 6 Ired. 361), and on the joint demise of two or more lessors, who are tenants in common with another or others, a recovery might be had to the extent of their combined interest, unless there was joined with them in the demise a person not shown to have such common interest with them (Bronson *v.* Paynter, 4 Dev. & B. 395; Hoyle *v.* Stowe, 2 Dev. 318). Where, in such cases, a general verdict of guilty was returned, the plaintiff was entitled to judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeded at his peril. Holdfast *v.* Shepard, *supra*. But as was said by Daniel, J., in Godfrey *v.* Cartwright, *supra*, "the more correct way of proceeding is for the jury to find the defendant guilty of the trespass and ejectment in the undivided portion of the land described in the declaration to which the lessor proves title on the trial, and then the judgment shall be rendered accordingly," viz., that the plaintiff be let into possession of, or as to, his undivided interest. In Lenoir *v.* South, 10 Ired. 241, Chief

Justice Ruffin, in speaking of the propriety of returning specific findings as to boundaries or extent of interest, said: "The jury may, indeed, give a general verdict, and it is usual to do so; but, when the precise interest of the lessor or the lessors of the plaintiff appears, it is generally proper, and most for the convenience, that the verdict should be according to it." But when the fictitious action was abolished, and that for possession was substituted for it, it became all-important, if title was put in issue, as it generally was, that the plaintiff's judgment should be limited to his actual boundary or to his specific interest, because it was no longer a contest between nominal, but real, parties, and the decree was conclusive both as to territorial limits and the nature of the seisin. Withrow *v.* Biggerstaff, 82 N. C. 82; Allen *v.* Salinger, *supra;* Gilchrist *v.* Middleton, 108 N. C. 683, 12 S. E. Rep. 85. In Gilchrist *v.* Middleton, *supra*, the court said: "One tenant in common of land may sue alone, and recover the entire interest in the common property, against another, claiming adversely to his cotenants as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do in order to protect the rights of his cotenants against trespassers and disseisors. But where it appears from the proof offered to show title, or is admitted, as in this case, that a defendant who has confessed ouster by denying plaintiff's title is in reality a tenant in common with the latter, it is the duty of the court to instruct the jury, by a specific finding, to ascertain and determine the undivided interest of the plaintiff. This obviates the danger of concluding the defendant by a general finding that the plaintiff is the owner." It thus appears "how one tenant in common may sue a trespasser who is infringing upon the rights of himself and his cotenants, and recover the entire land, or sue his cotenant, who simply refuses to recognize his right in his answer, and recover such interest, only, as he may establish title for."

The rule which we have been discussing is one peculiarly applicable to actions for the possession of land, being that which obtained in the trial of actions of ejectment modified so far as to accommodate it to the new remedy substituted for the old fictitious suit. "The exception to the general rule that all persons interested in, and to be affected, must be made parties, on the one side or the other, obtained in courts of equity, where they were very numerous, or it was impracticable to bring them all before the court." Story Ex. Pl., § 122; Bronson *v.* Insurance Co., 85 N. C. 444. Section 185 of the code reaffirms this principle, and enlarges its operation, by allowing one to sue for all others, both where the parties are very

numerous, and where they have common interests, in all actions, without regard to their nature. Bronson *v.* Insurance Co., *supra;* Pom. Rem., § 391; Thames *v.* Jones, 97 N. C. 126; 1 S. E. Rep. 692; Glenn *v.* Bank, 72 N. C. 626. But where one rests his right to sue alone in behalf of himself and others on the ground that the parties in interest are so numerous that it is impracticable to bring them before the court, he must so allege. Thames *v.* Jones, *supra;* McMillan *v.* Reeves, 102 N. C. 558; 9 S. E. Rep. 449; Clark's Code, p. 98. It is obvious, therefore, that one of several cotenants, when he brings an action against a trespasser on the common property, and proves the title of the other tenants in establishing his own, may, under the common-law practice in ejectment, applied to actions for the possession of land, recover the whole, though he claim sole seisin in his complaint in himself, just as he can do under the procedure described in the code, by alleging that the action is brought in behalf of himself and others having a common interest, though it has never been determined in this State how far, if at all, in the action under the provisions of the statute, the cotenants, not actual parties, would be concluded by the judgment. Thames *v.* Jones, *supra;* Pom. Rem., § 391. The statutory remedy not being exclusive, the plaintiffs were at liberty, after claiming sole seisin, to insist upon recovering the whole, if they showed title in themselves and cotenants, against a tort feasor in possession. If, therefore, the deed of Levinia Foster, executed in 1871, when in contemplation of law, it was possible that both Anna and Pheba Goforth might still have issue, operated, upon the death of the survivor of the two in 1887, to pass the one undivided sixth that would then have vested in her to the defendant as her grantee, then the defendant is a tenant in common; and the court should have instructed the jury to find that the plaintiffs were the owners of one undivided sixth, and should have given judgment that they be let into possession according to their interests. Levinia Foster executed the deed in 1871 to a contingent interest, which could vest in her only, in case both Anna and Pheba should die without issue, and she should survive them.

Blackstone (volume 2, p. 290) lays down the rule as follows: "Reversions and vested remainders may be granted, because the possession of the particular tenant is the possession of him in reversion or remainder; but contingencies and mere possibilities, though they may be released or devised by will, or may pass to the heir or executor, yet cannot, it hath been said, be assigned to a stranger unless coupled with some interest." The ancient policy, which prohibited the sale of a

pretended title, and adjudged the act to be an unlawful maintenance, it was well said by Chancellor Kent, has outlived the reason upon which it was founded, in a state of society very different from that now existing in any part of the United States or the British dominion. 2 Kent Comm. 447. The limitation is similar to that discussion in Watson *v.* Smith, 14 S. E. Rep. 640; the only difference being that the persons who were to take the contingent interest on failure of issue of J. W. B. Watson at his death were in that case designated by name, whereas in our case the contingent interest was to vest in "the lawful heirs" of the devisor, whoever they may be, upon the death of the survivor of the two daughters, and failure of issue of both. In some of the States there are statutes expressly providing that such expectancies can be conveyed by deed, but, in the absence of such legislation, we would be led into a discussion of questions as to which there is some conflict of opinion, if our decision hinged upon the inquiry whether Levinia Foster had the power in 1871 to convey, or only to make an assignment of her interest for a valuable consideration, which, as a contract to convey, she would be compelled by a court of equity to perform specifically on the happening of the contingency when her estate should vest, or whether she was prohibited by public policy, on account of the uncertainty of the persons who would fall under the description of "lawful heirs" on failure of issue of Anna and Pheba at the death of the survivor, from transferring her interest, either in law or equity. Washb. Real Prop., pp. 737, 776, 777; McDonald *v.* McDonald, 5 Jones Eq. 211; Mastin *v.* Marlow, 65 N. C. 695; 20 Amer. & Eng. Enc. Law, pp. 968, 969, notes; 1 Amer. & Eng. Enc. Law, p. 830; Shep. Touch. 238; 6 Cruise Dig. 27. If the deed were upheld only as an equitable assignment, and the defendant wished to rest her defense upon the ground that it passed the equitable interest of Levinia Foster to her, it would be essential that she should set forth and plead specifically her equity. Geer *v.* Geer, 109 N. C. 679; 14 S. E. Rep. 297. But, in order to obviate the necessity of discussing these intricate and interesting questions, this court, in the exercise of its discretionary power, has ordered to be certified a copy of the deed from Levinia Foster to Siddia Hackett, from which it appears that the grantor covenanted therein, for herself and her heirs, to forever warrant and defend the title to the lands conveyed to the said Siddia Hackett against the claims of all persons whatsoever. The deed with warranty, certainly took effect upon the death of Pheba, in 1887, so as to pass the title, by way of estoppel, to the defendant, as the grantee or Levinia Foster, to the one undivided

sixth which then vested in her, as against Levinia Foster or her heirs, if she were then dead. It does not appear positively whether Levinia was living or dead when Pheba died, in 1887, but the deed would estop her; or the warranty, her heirs. Benick *v.* Bowman, 3 Jones Eq. 314; Sedg. & W. Tr. Title Land, § 850; Tied. Real Prop., § 727; 6 Lawson Rights, Rem. & Pr., § 2701. The defendant being the owner of the undivided sixth interest that vested on the death of Pheba in Levinia Foster, or her children and heirs at law, was a tenant in common with the plaintiffs, and not a trespasser. The court below erred, therefore, in instructing the jury to find that the plaintiff was the owner, and entitled to the possession, of five undivided sixths of the land lying northeast of the creek. The response to the issue should have been that plaintiffs were the owners of one undivided sixth, and judgment should have been rendered that they be let into possession with defendant according to their interest. For the error mentioned a new trial must be granted. Whether the defendant can offer any testimony on the text trial that should be submitted to the jury as tending to show an estoppel in pais, remains to be seen. New trial.

Contingent Remainder to Surviving Children.

Chapin *v.* Crow, 147 Ill. 219; 35 N. E. 536.

Opinion by SHOPE, J.

This was a bill for specific performance, filed April 21, 1892, by Alice J. Crow against appellants, in which it is alleged that complainant sold to appellants, and they agreed to purchase, at the price of $8,250, certain lands. The contract of sale was reduced to writing, signed by the parties, which recited that $500 of the consideration had been paid as earnest money, and appellants contracted to pay the further sum of $7,750 upon the making of a good and sufficient deed conveying to them "a good and merchantable title to said premises." It is stipulated that the vendor shall convey a good and merchantable title, subject to certain leases, etc., and shall furnish an abstract brought down to date, showing such title. It is then provided that the purchaser, within ten days after receiving the abstract, shall deliver a note or memorandum of objections to the title, if any, etc.; and if material objections are found, not cured within 30 days after notice, the contract to be void, at the option of the purchaser, etc. The cause was heard on bill, answer, and proofs, and a decree entered according to the prayer of the bill.

The question presented is whether, by the deed to the War-

ringtons, the sons took a vested estate in remainder after the death of their father. If they did, it is conceded appellee had a merchantable title, and the decree was properly entered. The three — Henry, George, and James Warrington — joined in a warranty deed to appellee's grantor, and the question is whether that conveyed a perfect title. The deed calling for construction was made by Horatio L. Wait and wife to Henry Warrington, George Warrington, and James Warrington, parties of the second part, and purported to convey the premises in question to the "said Henry Warrington and his assigns for and during the natural life of the said Henry Warrington; and upon his death, then unto his sons, the said George Warrington and James Warrington, of the second part, to their heirs and assigns, forever, in equal parts if they shall both survive the said Henry Warrington; but, if either of said sons shall die without issue him surviving, then the survivor shall take all the said property hereby conveyed; but, if one of said sons shall die leaving issue, then one moiety to the survivor and the other moiety in equal parts to the children of the deceased." Habendum: "To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, in conformity with and in pursuance of the conditions of the aforementioned grant."

It will not be necessary in this case to discuss at length the doctrine of remainders, however interesting that might be. It should, however, be remarked that the rule is well established that contingent remainders are not favored, and unless, from the language of the instrument, it is manifest that a contrary result was intended, the estate will be regarded as vested, and not contingent. It is, however, equally well settled that effect must be given to the language employed, and, if an estate upon contingency is created, it must be so declared. "Vested remainder (or remainder executed, whereby a present interest passes to the party, although to be enjoyed *in futuro*) is where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent." 2 Bl. Comm. 168. Or, as said by Kent (4 Comm. 202): "A remainder is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. * * * A vested remainder is an estate to take effect in possession after a particular estate is spent." For, though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder if the interest is fixed. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. In cases of vested remainders, a present interest passes to a

determinate and fixed person or class of persons, to be enjoyed in the future. "Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect." 2 Bl. Comm. 169. "It is," says Mr. Preston (page 74), "not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between an interest which is vested and one which is contingent. It is in one case the certainty and fixed right of having the enjoyment at the time when the possession shall fall, and in the other case the uncertainty of having this right at that time, which are universally the characteristics and distinguishing features; the former instance of a vested estate, and in the latter instance an interest in contingency." Thus it is said by Blackstone (2 Comm. 170): "A remainder may be also contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain; as where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee. Here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, — the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first it never can vest in his heirs, but is forever gone. If A. dies first, the remainder to B. becomes vested." Fearne Rem., p. 1. In Smith *v.* West, 103 Ill. 332, this court quoted with approval from Hawley *v.* James, 5 Paige, 466, as follows: "Where the remainder-man's right to an estate in possession cannot be defeated by third persons, or contingent events, or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest," and from Moore *v.* Little, 41 N. Y. 72, that "decisions and text-writers agree that by the common law remainder is vested where there is a person in being who has a present capacity to take in remainder, if the particular estate be then presently determined; otherwise the remainder is contingent. * * * The person must be one to whose competency to take no further or other condition attaches, etc., *i. e.*, in respect to whom it is not necessary that any event shall occur, or condition be satisfied, save only that the precedent estate shall determine." Olney *v.* Hull, 21 Pick. 311; Thompson *v.* Ludington, 104 Mass. 193; Hull *v.* Beals, 23 Ind. 25; Dingley *v.* Dingley, 5 Mass. 537; Schofield *v.* Olcott, 120 Ill. 361; 11 N. E. Rep. 351.

In this case, that a life estate was vested in Henry Warrington is unquestioned. The grant is to Henry Warrington and assigns, for and during his natural life; and upon his death, then unto his sons, the said George Warrington and James Warrington, of the second part, in equal parts. If the grant to the sons had stopped here, there could have been no question that the estate vested in the sons as tenants in common. Such would have been the effect without the words, "in equal parts." These words, "in equal parts," are to be read with the succeeding words, "if they shall both survive the said Henry Warrington." There can be no question about the intent thus far. But these words are followed by the clause: "But if either of said sons shall die without issue him surviving, then the survivor shall take all of said property hereby conveyed." That is, the intention expressed is, they shall take in equal parts if they both survive the life tenant, but if one die without surviving issue, the other shall take the whole; thus attempting, upon the contingency of one dying during the continuance of the life estate, without issue surviving him, to cast the whole estate upon the survivor. It is unnecessary to determine whether, if the granting clause had ended with this provision, the estate would have vested in the two, subject to be divested as to one who should die during the life estate without surviving issue or not. In our opinion, the remaining portion of the granting clause clearly indicates an intention that, upon the contingency that one of the sons shall die before the termination of the life estate, leaving issue him surviving, the estate of the decedent shall go to his children. As we have seen, after granting to the sons and their heirs and assigns in remainder in equal parts if they shall both survive the life tenant, but, if either should die without issue surviving before the falling in of the precedent estate, then the survivor shall take the whole, there is the further condition: "But if one of said sons shall die leaving issue, then one moiety to the survivor, and the other moiety in equal parts to the children of the deceased." It is clear that by the words, "if one of said sons shall die leaving issue," was meant, if the sons shall die leaving issue before the vesting of the estate in possession, — that is, before the termination of the intermediate estate, — then, and in that event, the moiety that would have vested in him had he lived is granted to his children.

The term "children," in its natural sense is a word of purchase, and will be taken to have been so used, unless so controlled and limited by other expressions in the instrument as to show that it was intended as a word of limitation. We need not extend this opinion by a discussion of this proposition; it

will be found to be well established. In re Sanders, 4 Paige, 293; Baker *v.* Scott, 62 Ill. 86; Bearcroft *v.* Strawn, 67 Ill. 28; Rogers *v.* Rogers, 3 Wend. 503. Not only are there no words tending to show that the word "children" was here used as meaning heirs generally, but it is clearly shown to have meant the issue of the son dying. Upon the contingency, therefore, of one of the sons dying before the falling in of the life estate, leaving children surviving him, such children would take, not as heirs of the son dying, but as grantees in the deed, — as purchasers. Ebey *v.* Adams, 135 Ill. 80; 25 N. E. Rep. 1013, and cases cited. This being so, it is apparent that it was not fixed and determined by the deed who should take absolutely at the termination of the precedent estate. If the sons survive the father, the estate would be vested in them, both in interest and possession. If one of them died, leaving children him surviving, the estate would, upon the termination of the life estate, vest in the survivor of the two sons and the children of the deceased son. If the limitation had been to the sons, and, if they died before the life estate terminated, then to a stranger, no question could have been made that the estate was contingent upon their surviving until the expiration of the intermediate estate. Precisely the same occurs here. The grant is to the sons, if alive when the estate terminates; if not, to their children surviving them as a class. It cannot be known until the death of the life tenant whether the contingency upon which the sons are to take will exist. Nor can it be known whether the children of either one of them will take, as that will depend upon the contingency of issue being born, the death of the sons and the children surviving them. Nor need we determine here what would be the result if both sons should die during the continuance of the particular estate, with or without issue. It is clear, we think, that the estate in the sons, James and George Warrington, was contingent upon their surviving the life tenant; or, if one of them should die, and not the other, that the deceased son should have died without issue him surviving. It follows necessarily that we are of opinion the deed from the Warringtons to Smith and from Smith to appellee did not convey a good and merchantable title, and the decree ordering specific performance of the agreement of purchase and sale was therefore erroneously entered. It will accordingly be reversed, and the bill dismissed.

Remainders and the Rule of Perpetuity.

Seaver *v.* Fitzgerald, 141 Mass. 401; 6 N. E. 73.

This was a real action in which the defendant claimed title to, and sought to recover possession of, a parcel of land in Lawrence. The plea was *nul disseisin*. Hearing in the superior court before GARDNER, J., who found the following facts: —

The defendant claimed title to the premises by descent, as next of kin and heir at law of Annie J. Rafferty, who died at Lawrence in 1879. One Hugh Rafferty, at the time of his death in 1873, was seised in fee simple and possessed of said premises, so described in the writ in this action. Said Hugh left a last will and testament, which was duly proved and allowed in the probate court for the county of Essex. At the time of said Hugh Rafferty's death, his sole heir and next of kin was his daughter, Annie J. Rafferty, named in said will as *cestui que trust*. Said Annie J. died at said Lawrence in 1879, intestate, unmarried, and without issue. The demandant is her heir; the said Elizabeth being the sister of said Hugh Rafferty, who was the father of said Annie. The tenant, Fitzgerald, was in possession of said premises claiming a title in fee thereunto under a deed from the Augustinian Society, named in said will, to whom said trustees conveyed the same after the death of Annie J. Rafferty. The demandant claimed that the devise to the Augustinian Society was void, and the deed of the trustees to it therefore passed no title.

Upon the foregoing facts the court ruled that the demandant could not maintain her action in law, and reported the case for the consideration of the full court. The material part of the will of said Hugh Rafferty was as follows: —

"*Item* 12. I give, bequeath, and devise all the remainder of my property, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, to my said executors, Patrick Sweeney and Thomas Conway, to hold in trust, to use so much of the income thereof as shall be needed to give my daughter, Annie J. Rafferty, a good and suitable support so long as she shall live; also, if she shall ever have a child, or children, my said executors shall support them in a proper manner from said income or property during the life of each and all. The balance of said income and the property, after death of my said child and her child or children (if any), shall all be paid over by my executors for the sole use and benefit of the Augustinian Society of Lawrence, a body corporate, duly established by the laws of

this commonwealth in the year of our Lord eighteen hundred and seventy, to said corporation forever."

C. Allen, J. There is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, providing the vesting of the estate in the latter is not postponed too long. Loring *v.* Blake, 98 Mass. 253; Evans *v.* Walker, 3 Ch. Div. 211; In re Roberts, 19 Ch. Div. 520; Lewis Perp. 417–511.

In all the cases cited by demandant's counsel, the gift over was to persons who might not be ascertainable with certainty within the allowed time. But the present case is not of that class. There was no contingency of uncertainty as to who should finally take. The estate or interest vested in the Augustinian Society, a body corporate, absolutely and at once, upon the testator's death, subject to the preceding life estates. All that is required by the rules against perpetuities is that the estate or interest should vest within the prescribed period. The right of possession may be postponed longer. Moreover, the devise was to take full effect, with right of possession, upon the death of the testator's daughter, Annie, if she should leave no child. In point of fact, she left none. Therefore, in this alternative contingency, not only the estate, but the right of possession, would certainly vest within the permitted period; and as this contingency is the one which happened, the validity of the devise would not be affected by the consideration that the other contingency might be too remote. Jackson *v.* Phillips, 14 Allen, 572, and cases there cited.

On both grounds the entry must be, judgment for the tenant.

Rule in Shelley's Case.

Carson *v.* Fuhs, 131 Pa. St. 256; 18 A. 1017.

Appeal from court of common pleas, Allegheny County; J. W. F. White, Judge.

Ejectment by William Carson and Eliza his wife, and others, against Adam Fuhs and others. Verdict for plaintiffs, subject to the opinion of the court upon the question of law reserved. The question of law reserved was decided in favor of defendants, and judgment was entered for defendants *non obstante veredicto*. Plaintiffs appeal. The following is the opinion of the court below, deciding the reserved question: —

"The plaintiffs are children of Mrs. Isabella Hamilton, deceased, who was wife of Stewart Hamilton, and claim under a

deed of trust executed by Stewart Hamilton and wife to their son James Hamilton, dated 18th January, 1867, for three lots of ground in Allegheny city. The deed is to James Hamilton, his heirs and assigns, in fee-simple, with covenant of general warranty, 'in trust for the uses hereafter mentioned,' in consideration of 'one dollar and natural love and affection and better maintenance of the parties for whose use this deed is made in trust,' etc. The trust is in these words: 'In trust, nevertheless, for the use of the said Isabella Hamilton during her natural life, and at her decease then to her heirs in fee, share and share alike, and in the meantime to allow and permit her to receive to her own use the rents, issues thereof, subject to the taxes and costs of executing this said trust.' Nine months thereafter, 30th October, 1867, James Hamilton conveyed back the premises to Stewart Hamilton, describing himself as 'trustee of Isabella Hamilton and her heirs,' in consideration of 'one dollar,' but making no reference to the trust-deed, or his title, and conveying in the usual form, as if the property was his own, with general warranty, signing his name simply, 'James Hamilton.' Stewart Hamilton and Isabella, his wife, subsequently, by deeds dated 25th February, 1868, and 12th January, 1869, conveyed two of the lots to James Hamilton, who conveyed to Adam Fuhs, and then by deed of 30th April, 1874, Stewart Hamilton and Isabella, his wife, conveyed the remainder to Adam Fuhs, who thus claims title to the whole. In none of their conveyances is there any reference to the trust-deed from Stewart Hamilton and James Hamilton. Isabella Hamilton died 8th July, 1885, leaving ten children, and her husband, Stewart Hamilton, who is still living. The question of law reserved is, what title did Isabella Hamilton take by the trust-deed? If she took merely a life-estate, the plaintiffs are entitled to recover; if a fee, either under the rule in Shelley's Case or by virtue of the statute of uses, they are not. I think no question of estoppel can be raised against the plaintiffs during the life of their mother. All the deeds were duly recorded, before Adam Fuhs bought. The trust-deed was directly in the line of his title, and he had constructive notice of it. He paid his purchase money, and made improvements at his own risk. The rule in Shelley's Case is firmly established as a law of this State. While it is difficult to reconcile some of the decisions, the rule itself has never been denied, and no avowed effort made to defeat or evade it. The rule, briefly stated, is this: When by deed or will an estate in land is given to one for life, and at his death the remainder to his heirs in fee, the estate of the life-tenant is

enlarged to a fee; the two estates are merged in one, and the first taker takes the whole. The true test in the application of the rule is, did the grantor or donor intend that the remaindermen should take as heirs of the life-tenant? 'The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take.' Guthrie's Appeal, 37 Pa. St. 12. Not the intention that the first taker should have only a life-estate; for that intention must be overthrown, if apt words are used to bring the case within the rule. The word 'heirs' may be limited or modified by other unequivocal expressions in the deed or will, and other words than that of 'heirs' may have the effect of bringing the case within the rule. 'Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate' of the life-tenant into a fee by implication. Potts' Appeal, 30 Pa. St. 170; McKee *v.* McKinley, 33 Pa. St. 93; Dodson *v.* Ball, 60 Pa. St. 493; Yarnall's Appeal, 70 Pa. St. 341. If the deed we are considering had been directly to Isabella Hamilton 'during her natural life, and at her death then to her heirs in fee, share and share alike,' there could be no doubt she would have taken a fee. The added words, 'share and share alike,' are not sufficient to take it out of the operation of the rule. Physick's Appeal, 50 Pa. St. 136; Ogden's Appeal, 70 Pa. St. 501. But the rule in Shelley's Case does not apply unless both estates — for life and remainder — are of the same quality; both legal or both equitable. Here the legal estate under the trust-deed is in the trustee, and Isabella Hamilton had only an equitable life estate. So had the remainder-man; but, under the statute of uses, it became an executed trust as to them, and they took the legal estate in remainder, if the first taker had only a life-estate. Was it a dry or executed trust, also, as to her, so that she took the legal estate under the statute of uses? A dry, naked trust, where no duties are to be performed by the trustee, is a passive trust, and, as a general rule, is executed by the statute. Active trusts, where important duties are confided to the trustee, — such as renting and managing the estate, investing money, distributing the proceeds, etc., — are not within the operation of the statute. Others, not strictly active, but passive, trusts, will be saved where (1) it is necessary for the protection of a married woman; (2) for the protection of a spendthrift child; (3) to support contingent remainder; (4) or to serve some other useful and lawful purpose. As the trustee had no duties to perform under this trust, it falls under the second class, — passive trusts. The only ground for contending it is saved from

the operation of the statute is that it was for the protection of a married woman.

"Mrs. Isabella Hamilton was the beneficiary, and the only one intended to be provided for by the deed of trust. Although the consideration is stated as 'one dollar and natural love and affection and better maintenance of the parties for whose use this deed is made in trust,' yet the only person mentioned as interested in the trust, or whose maintenance is provided for, is Isabella Hamilton. The trustee is to 'allow and permit her to receive to her own use the rents and issues thereof, subject to the taxes and cost of executing this trust.' The object of creating a trust for a married woman is to save the property from the debts or control of her husband. Trusts for this purpose, or for one in immediate contemplation of marriage, will be sustained. 'When an active trust is created, to give effect to a well-defined purpose of a testator in reference to his family, the trust must be sustained whether the *cestui que trust* is *sui juris* or not.' Barnett's Appeal, 46 Pa. St. 392; Earp's Appeal, 74 Pa. St. 119; William's Appeal, 34 Leg. Int. 297. But even an active trust ceases when there is no longer any purpose to serve by keeping it alive. If the trust is simply for the benefit of a married woman, or one in contemplation of marriage, it falls when she becomes discovert, and is not revived by a subsequent marriage. Bush's Appeal, 33 Pa. St. 85; Earp's Appeal, *supra*. Dodson *v.* Ball, 60 Pa. St. 492, is where a single woman conveyed land to a trustee in trust to permit her to occupy, manage, and rent her premises, and take the income for her sole and separate use for life, and upon her decease to convey the same to such person as she might appoint, or, in default of a will, to such persons as would be entitled under the intestate law, etc. She afterwards married, and her husband died. By bill she asked for reconveyance. It was held an executed trust, and she entitled to reconveyance. The opinion of the court concludes: 'The trust being passive, and the trustees not needed to protect any other interest, Mrs. Dodson being *sui juris* and competent to exercise any power which had been vested in the trustees, the ulterior trust not being intended to protect any special interest, but being exactly commensurate with her own power and estate as absolute owner, there is no proper or useful purpose to uphold the trust, and it consequently fell when she became discovert.' This case was not strictly a passive trust, for there were certain duties to be performed by the trustees. But it fell with discoverture. Trusts for the 'sole and separate use of married women have been sustained in order to effectuate the object of the trusts;

that is, save the property from the control or debts of their husbands. When the husband dies, the trust falls, because there is no longer any necessity for it. Our married woman's act of 1848 secures to married women the entire control and management of their separate estate, and protects it from the debts and liabilities of their husbands. It accomplished all that could be accomplished by a trust for that purpose. Hence such a trust is no longer of any necessity or practical advantage, and should fall or be considered an executed trust, as in cases of discoverture. The trust-deed in this case was executed in 1867, nine years after the passage of the act of 1848. It is, as we have seen, solely for the benefit of Mrs. Isabella Hamilton, then a married woman. If the title had been made directly to her, she would have taken the property entirely free from the control, debts, and liabilities of her husband. The trustee was simply the depository of the legal title, with no duties whatever to perform. It was a dry, naked trust. Mrs. Hamilton was to receive the rents and issues, subject to taxes and expenses, during her natural life, and at her death then the property to go to her heirs. As there was no useful purpose to be served by the trust, it was executed by the statute of uses and fell still-born at its birth. The trustees had no duty to perform during her life, or at her death. The trustee was not required to convey. The property went to the heirs of Mrs. Hamilton by virtue of the trustee's deed itself. Both estates — for life and in remainder — being legal, they merged, and Mrs. Hamilton took the fee, under the rule in Shelley's Case. It follows that Mrs. Hamilton and her husband should convey the fee. They might have done that, perhaps, without a reconveyance by the trustee; but after such reconveyance, and deeds for the fee-simple duly executed by Mrs. Hamilton and her husband for the whole property, her children have no claim or interest in the property. And now, January 26, 1889, the question of law reserved is decided in favor of the defendant, and it is ordered that judgment be entered for the defendant *non obstante veredicto*. At request of plaintiff's counsel, bill of exception sealed to the above ruling and judgment of court."

Paxson, C. J. Under any view we may take of this case, the plaintiffs cannot recover in this action. If they are right in their contention that the deed to James Hamilton created a valid separate use trust in favor of his mother, Isabella Hamilton, they are not entitled to the possession of the real estate in controversy, for the reason that the husband of Isabella Hamilton is still living, and entitled to his curtesy therein. Mrs.

Hamilton having an equitable estate in fee, her husband would be entitled to his life-estate. Dubs *v.* Dubs, 31 Pa. St. 149; Rank *v.* Rank, 120 Pa. St. 191; 13 Atl. Rep. 827. We might well affirm this judgment without more, but, as we have the whole question before us, we prefer to decide it now, to prevent further litigation in the future. The trust contained in the deed from Stewart Hamilton *et ux.* to James Hamilton is as follows: "In trust, nevertheless, for the use of said Isabella Hamilton, wife of the said Stewart Hamilton, during her natural life, and at her decease then to heirs in fee, share and share alike, and in the meantime to allow and permit her to receive for her own use the rents, issues thereof, subject to the taxes and costs of executing this trust." The question is, what estate did Mrs. Hamilton take under this conveyance? The contention of the plaintiffs is that she took out a life-estate; that the deed created a separate use trust in her favor, which must be supported for her protection. It is to be noticed that the language does not create a technical separate use trust, nor is there anything from which we can draw the inference that a separate use trust was intended by the grantors, or even contemplated by them. It must not be overlooked that the deed to James Hamilton was made by Mrs. Isabella Hamilton and her husband, in trust for the said Isabella. Had there been a conveyance to her direct, instead of to a trustee, there can be no doubt that it would have passed the fee. The added words, "share and share alike," referring to the "heirs," would not have been sufficient to take it out of the rule. Physick's Appeal, 50 Pa. St. 136; Ogden's Appeal, 70 Pa. St. 501. Does the fact that a trust was interposed make any difference? This depends upon the character of the trust. If it is a separate trust, or one which it is necessary to preserve for any purpose, Mrs. Hamilton's interest would be limited to a life estate. As was said by our Brother Sterrett, in Little *v.* Wilcox, 119 Pa. St. 448; 13 Atl. Rep. 475: "A trust is never executed by the statute when its preservation is necessary, either for the protection of a *feme covert*, spendthrift child, or to support a contingent remainder, or to serve some other useful and lawful purpose." We see no such purpose to serve in this case. It is not, as before observed, a separate use trust in terms. It provides no protection or restriction which is not given by the act of 1848; and while separate use trusts may be created since the passage of that act, and may after be very useful to protect a woman from the importunities of her husband, or from her own weakness, we are not disposed to strain a point to create such trust by mere implication. The trustee in this case had no active duties to perform.

It is a passive, dry trust, with no interest to guard, no rights to protect. In such case the *cestui que trust* is entitled to a reconveyance of the legal title. Equity will consider that done which ought to be done, and declare the legal title in Mrs. Hamilton. It then comes within the rule in Shelley's Case, and the life-estate and remainder coalesce, the effect of which is to give the fee to Mrs. Hamilton. We need not pursue the subject further, in view of the careful and elaborate opinion of the learned judge below.

Judgment affirmed.

Effect of Abolition of Rule in Shelley's Case.

Godman *v.* Simmons, 113 Mo. 122; 20 S. W. 972; compare Moore *v.* Littell, 41 N. Y. 66.

Brace, J. This is an action in ejectment, in which the plaintiffs seek to recover an undivided three-fourths of a tract of land in Saline County. The answer admitted possession, and denied all the other material allegations of the petition. The case was tried before the court without a jury, the judgment was for the defendants, and the plaintiffs appeal.

Elizabeth O'Bannon is the common source of title. On the 26th day of October, 1868, she and her husband duly executed, acknowledged, and delivered a warranty deed conveying the premises to Mary R. Godman "for and during her natural life, and with remainder to the heirs of her body. * * * To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging, or in any wise appertaining, unto the said Mary R. Godman during her natural life, and then to the heirs of her body and assigns forever." The plaintiffs, William C. Godman, Josephine C. Way, and Mattie B. Naylor, are the children of the said Mary R. Godman, who died in March, 1888. Besides the plaintiffs, the said Mary R. Godman had three other children, — Burton L. Godman, who died in 1876; Mollie, who intermarried with one Emmerson, and afterwards died in February, 1880, leaving one child, Edward, surviving her; and Beal Godman, who died in September, 1888, without lineal descendants. The plaintiffs, after showing these facts, rested, and the defendants, upon their part, introduced in evidence a deed of trust executed by Melvin Godman and the said Mary R. Godman, his wife, the said William C. Godman and wife, John B. Way and the said Josephine C. Way, his wife, and the said Burton L. Godman and Mollie Godman, to Samuel Boyd, trus-

tee, to secure the payment of a promissory note to one George Farlow for $1,300, due one year after date, with power of sale upon default in payment of the debt at maturity. This deed was dated April 4, 1876. The defendants also offered the note, secured by said deed of trust, which is signed by all of the grantors therein. The defendants next offered a deed from Samuel Boyd, trustee, to Henry Emmerson, dated October 10, 1877. This deed was made in pursuance of a sale under the power contained in the foregoing deed of trust. The defendants next offered a deed dated October 19, 1878, containing covenants of general warranty, from Henry Emmerson and wife to defendant Henry C. Simmons, and then a deed dated January 27, 1880, from Henry C. Simmons and wife to Melvin Godman. Next a deed of trust of same date from Melvin Godman and wife to W. R. Gist, trustee to secure an indebtedness due to said H. C. Simmons, and a deed from Gist, trustee, under the power of sale contained in said deed of trust, to Henry C. Simmons, dated September 1, 1886. The defendants next offered a deed dated April 3, 1880, from Beal Godman to Melvin Godman, and deed dated May 23, 1881, from Mattie B. Naylor and husband, conveying her undivided interest in the land to Melvin Godman. The plaintiffs objected to the introduction of each of the foregoing deeds on the ground that same "was incompetent, irrelevant, and immaterial," and the objection in each instance was overruled by the court. They also asked declarations of law in effect excluding said deeds, and declaring that the plaintiffs had the title to the land sued for, which instructions or declarations of law the court refused to give, and plaintiffs excepted.

1. It is provided by the statute of this State that "when a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the person who on the termination of the life estate, shall be the heir, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited to them." Rev. S. 1889, § 8838; Gen. St. 1865, p. 442, § 6. The deed of Elizabeth O'Bannon came before us for construction in the recent case of Emmerson *v.* Hughes (Mo. Sup.), 19 S. W. Rep. 979, and we there held "that the statute just quoted converted the estate tail created by the deed at common law into a life estate in the first taker, with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of her body;" and as no one can be the heir of a living person, it could not be told who the heirs of the body of Mary R. Godman would be

until her death, when the contingent remainder in fee under the deed would vest; and that Mrs. Emmerson, not being alive at that time, took no estate under the deed of Mrs. O'Bannon, and conveyed none by the deed of trust to Boyd, made in her life-time before the death of Mrs. Godman. In her case she had no vested estate at the time the deed was made, and no estate ever vested afterwards. Now, while the plaintiffs and Beal Godman were in the same relation to the title to the premises as Mrs. Emmerson at the time they made their deeds, they survived their mother, and their remainder contingent during the life-time of the mother became a vested estate at her death; and the main question in the case is, did this estate pass by their deeds? The deed of trust executed by plaintiffs William C. Godman and Josephine C. Way purported to convey to Boyd, trustee, the premises in fee simple, and contained the statutory covenants implied by the use of the words, "grant, bargain and sell." The deed of plaintiff Mattie B. Naylor and husband purported to "grant, bargain, and sell all their interest in the premises to Melvin Godman. In the language of the deed: "The interest hereby intended to be conveyed is the entire interest of Mattie B. Naylor in the above-described lands as one of the daughters of Mary R. Godman, whether present or prospective, vested or contingent, and especially any remainder she may now have, or hereafter be entitled to, in said lands under a certain deed made by M. W. O'Bannon and wife to said Mary R. Godman, of date October 26, 1868." The deed of Beal Godman, as party of the first part, purported to "remise, release, and forever quitclaim" unto the said Melvin Godman, party of the second part, "all of his right, title, interest, and estate in expectancy in and to" the premises, to have and to hold the same, "so that neither said party of the first part, nor his heirs, nor any other person or persons for him or in his name or behalf, shall or will claim or demand any right or title in the aforesaid premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred." At the time these deeds were made the plaintiffs, William C. Godman, Josephine C. Way, and Mattie B. Naylor, and their brother, Beal Godman, each had an interest in this real estate. The estate they were to have, however, was contingent upon the death of their mother and their surviving her. The first event was sure to happen, and they were sure to take if they did survive her; but whether they would survive her, and thus become heirs of her body, was uncertain, and hence the interest they had was no more than a contingent remainder, and a contingent remainder of that class that grows out of the uncertainty of the persons

to take at the termination of the life estate. Such an interest was not alienable at common law before the contingent happened. 2 Washb. Real Prop. (5th Ed.), p. 264, § 6; Tied. Real Prop. (2d Ed.), § 411; 6 Amer. & Eng. Enc. Law, p. 900. This rule of the common law seems to have been abolished in England by 8 & 9 Vict. c. 106, § 6, providing that "after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed," and by statute in New York, Michigan, Minnesota, and Wisconsin, making all expectant estates alienable in the same manner as estates in possession. 2 Washb. Real Prop., p. 267, § 5. In this State, while we have no similar express statute, our statutes do provide that "conveyances of lands, or of any estate or interest therein, may be made by deed" (Rev. St. 1889, § 2395); that all estates and interest in land are subject to be seized and sold under execution (*Id.*, §§ 4915, 4917); and that any person having an interest in real estate whether the same be present or future, vested or contingent, can come into partition for the disposal of such interest (*Id.*, §§ 7136, 7137). Reinders *v.* Koppelmann, 68 Mo. 482. This rule of the common law seems to be inconsistent with the general scope of our statutes regulating the disposal of real estate, and not in harmony with the genius and spirit of our institutions, which brook no restraint upon the power of the citizen to alienate any of his property. We are pre-eminently a trading and commercial people; our lands are our greatest stock in trade, and the whole tendency of our laws is to encourage and not restrain their alienation. The spirit and genius of the feudal system and the common law was exactly the reverse; and we do not think this now almost obsolete common-law rule ought to obtain in this State.

The point in question, so far as we are advised, has never been passed upon directly in our appellate courts; but the St. Louis court of appeals had occasion to consider this rule in Lackland *v.* Nevins, 3 Mo. App. 335, and that court, speaking through Judge Bakewell, said of it: "The doctrine that contingent interests in real estate cannot be conveyed by law remained as one of the last relics of a system of which the policy was to hinder the alienation of land. It is now done away with in England by statute. It is contrary to the policy of our system, and our

statute of conveyances, which says that 'conveyances of land, or of any estate or interest therein, may be made by deed executed,'" etc. A contingent remainder is not an estate in lands, since it is merely the chance of having, but it is an interest in land, and one which long remained inalienable, simply because it had never been thought worth legislating about; so that, as Williams says (Williams, Real Prop. 257), "the circumstance of a contingent remainder, having been so long inalienable at law, was a curious relic of the ancient feudal system." Our statute is careful to make alienable by deed, not only estates, but also interests in land, which covers the case of executory devises and contingent remainders as fully as if they were named. In White *v.* McPheeters, 75 Mo. 286, this court seemed to entertain no doubt that under our statute in regard to executions, which declares that the term "real estate" as therein used "shall be construed to include all estate and interest in lands, tenements, and hereditaments," the sale of a remainder under execution, whether it be regarded as vested or contingent, was authorized. It would be remarkable, indeed, if it were the law that a citizen had something which by the law of the land he could not sell and transfer himself, but which the sheriff, under execution, could sell and transfer for him. This ancient common-law rule that contingent remainders are inalienable, like the rule that choses in action are not assignable, does not obtain in this State, not because there has been a positive statute abolishing these rules, but because they are out of harmony with its general affirmative statute upon these subjects, and long since have ceased, if they ever did exist, as rules governing the action of its citizens in the business relations of life. If, then, the contingent interests of the said three plaintiffs and of the said Beal Godman in the premises were the subject of grant by deed duly executed in accordance with the requirements of our laws, the effect of these conveyances was to transfer to the grantees such interests, with all their incidents, to hold in the same right and to the same extent as they were held by the grantors before being conveyed, — the grantees were thereby put in their shoes. If the grantors died before the termination of the life-estate, the grantees took nothing. If they survived their mother, the grantees took just what the grantors would have taken if the conveyance had not been made. There can be no doubt that such was the intention of the parties, and such ought to be, and we believe is, the effect of these conveyances under the laws of this State. This being so, the defendant, by a regular chain of conveyances, having acquired the title of the grantees in these

deeds to the premises, the judgment of the circuit court was for the right party. There was some evidence pro and con upon the question of the delivery of the deed from Beal Godman. It is evident from the instructions and finding that the court must have found this question of fact for the defendants, and as there was evidence tending to support that finding, its judgment thereon is final.

The judgment is affirmed. All concur.

CHAPTER XIII.

USES AND TRUSTS.

McKenzie *v.* Sumner, 114 N. C. 425; 19 S. E. 375.
Faber *v.* Police, 10 S. C. 376 (1877).
Hanks *v.* Folsom, 11 Lea, 555.
Buffington *v.* Maxam, 152 Mass. 477; 25 N. E. 975.
Burdette *v.* May, 100 Mo. 13; 12 S. W. 1056.
Wemyss *v.* White, 159 Mass. 484; 34 N. E. 718.
Hutchins *v.* Van Vechten, 140 N. Y. 115; 35 N. E. 446.
Brandon *v.* Carter, 119 Mo. 572; 24 S. W. 1035.

Passive Use to Married Women When Held to Be Her Separate Estate and Unexecuted by the Statute of Uses.

McKenzie *v.* Sumner, 114 N. C. 425; 19 S. E. 375.

Appeal from superior court, Rowan County; Jacob Battle, Judge.

Bill in equity by C. H. McKenzie and wife against Julian E. Sumner. From a decree for plaintiffs, defendant appeals. Affirmed.

Thomas J. Sumner devised to defendant certain land in trust for plaintiff, "to have and to hold, to her and her heirs, in fee simple, forever." He also bequeathed to defendant, in trust for plaintiff, fifty shares of stock in a manufacturing company. Plaintiff is a married woman, and sues to have the legal title to this property vested in her, and the trust terminated.

SHEPHERD, C. J. As to the real estate devised to the defendant for the benefit of the plaintiff, there is no reason why the legal title is not vested in the plaintiff by the statute of uses, as the land is not conveyed to her "sole and separate use" (see authorities collected in Malone Real Prop. Tri. 544), nor is the trustee charged, in any manner whatever, with any special duties in respect to the same. The case does not fall within either of the three well-known exceptions to the operation of the statute, and it would seem clear that the legal estate is executed in the

plaintiff. 1 Perry Trusts, 298, and the numerous authorities cited in the note. The statute, however, does not apply to personal property, such as notes and bank stock; and the legal title remains in the trustee until it is, in some way, transferred to the equitable owner. Is there any reason why the court, exercising its equitable jurisdiction, should not have directed the assignment of the legal title in this instance? We can see none. The plaintiff being the absolute equitable owner, there are no ulterior limitations to be protected; and under the terms of the will the trustee has nothing but a bare, naked, legal estate, unaccompanied, as we have remarked, with a single, specified duty. As the plaintiff's separate estate is fully protected against the interference of her husband by the provisions of the constitution, and as the trustee has no power to withhold from her either the property or its income, we are unable to see why the legal title should remain in him, unless it be to enable him to charge the 5 per cent commissions which he claims for "simply collecting and paying over the dividends upon the stock." We do not deem it necessary to enter into an elaborate discussion of the subject, but will simply refer to the following authorities, which, although perhaps not exactly in point, fully sustain, upon principle, the ruling of his honor: Turnage *v.* Green, 2 Jones Eq. 63; Battle *v.* Petway, 5 Ired. 576; Jasper *v.* Maxwell, 1 Dev. Eq. 358. We will add the following extract from Lewin on Trusts (page 18): "The simple trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settler [and such is the case here], is left to the construction of law. In this case the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs." This is so clearly a simple trust that, under our decisions, the property, prior to the present constitution, would have belonged to the husband. Ashcraft *v.* Little, 4 Ired. Eq. 236; Heartman *v.* Hall, 3 Ired. Eq. 414. We have examined the authorities cited by the intelligent counsel for the appellant, but they do not satisfy us that the judgment below was erroneous. The judgment, in all respects, is affirmed.

Contingent Use, Defeated by Livery of Seisin by Tenant for Life.

Faber *v.* Police, 10 S. C. 376 (1877).

Opinion by McIver, A. J. C. H. Faber, by his last will and testament, devised the land in question to certain trustees in trust

for the use of his son John Lewis Faber, for his life, and from and immediately after the death of his son in trust for the lawful issue of said son living at the time of his death; and in case of his death without leaving issue living at the time of his death, then to his residuary legatees and devisees. The testator died leaving his widow and his son John Lewis Faber as his only heirs at law. On the 1st of July, 1843, John Lewis Faber, being then of age and in possession of the premises, conveyed the same by deed of feoffment and livery of seisin to one Folker, who on the next day reconveyed the same to the said John Lewis Faber in fee simple, and a few days thereafter the widow of the testator released all her right in the premises to John Lewis Faber. At the time of the execution of this deed, John Lewis Faber had never been married, but he subsequently married and now has three children, all of whom are minors. On the sixth of February, 1851, John Lewis Faber conveyed the premises to his mother, who died intestate some time in the year 1851, leaving as her sole heir-at-law her son, the said John Lewis Faber. No letters of administration upon her estate have ever been taken out. On the 19th of July, 1875, the defendant, J. G. Police, contracted to purchase from the plaintiff, John Lewis Faber, the said premises, but afterwards declined to accept a fee simple interest. This action was then brought to recover damages for the breach of such contract, the real object being to obtain the decision of the court as to the validity of the title.

The appellant contends: 1st. That the estate limited to the issue of John Lewis Faber is vested and not a contingent remainder, and therefore the remainder was not barred by the deed of feoffment and livery of seisin. Questions of this kind are involved in no little difficulty and uncertainty, owing mainly, as we think, to the efforts which the courts have made to construe limitations, so as to constitute vested instead of contingent remainders, — the rule being, as stated by Kent (4 Com. 203) that "the law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested." This rule by its very terms admits, as it should do, the paramount importance of the intention of the testator, which must necessarily override every other rule and be the governing principle, otherwise the court instead of the testator would make the will. Hence, when the testator's intention can be discovered, it must necessarily be carried, unless it is inconsistent with the law of the land. In looking for this intention we must be guided by the words which the testator has used, reading them in the light of established principles of law. Look-

ing, then, at the clause of the will under consideration in this light, we think it clear that the remainders created are contingent and not vested remainders. It is very clear, from the language used, that the testator did not intend that the issue should take the estate in remainder absolutely and at all events, but only on a contingency — that of their surviving their father; and it is equally clear that he did not intend that the residuary legatees and devisees should take the estate in remainder absolutely and at all events, but only on a contingency — that of the son dying without leaving issue living at the time of his death. There is no language in the will which would convey the idea that the testator intended that either class of remainder-men should be invested with an absolute right with only the enjoyment in possession postponed to a future period but is made to depend upon an uncertain event. This manifest intention of the testator is not only not inconsistent with any of the rules of law, but on the contrary, as we shall see, is in strict conformity with such rules. According to the elementary writers a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder on the other hand is one on which is limited to a person not in being or not ascertained; or if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future so that the most marked distinction between the two kinds of remainders is that in the one case the *right to the estate* is fixed and though the *right to the possession* is deferred to some future period; while in the other the *right to the estate* as well as the *right to the possession* of such estate is not only deferred to a future period but is dependent upon the happening of some future contingency. As it has been well expressed, "it is not the uncertainty of the estate in the future but the uncertainty of the right to such enjoyment which marks the difference between a contingent and a vested remainder."

Keeping in mind these principles, which are so well established as to need no citations of authority to support them, and remembering that the estate in remainder, whether vested or contingent, must necessarily have been created at the same time that the particular estate upon which it rests passed out of the testator, we will find no difficulty in determining the nature of the estate in remainder credited by the will under consideration. These estates, as well the particular estate for the life of John Lewis Faber as the estate in remainder to his issue, and in default of such issue to the residuary legatees

and devisees, passed out of the testator at the time of his death — the time when his will, the instrument by which the estates were created, speaks. Then it was that these estates were created, and to that point of time must we look to determine their character. It is very clear that at that time it was wholly uncertain who would be the persons to take at the termination of the particular estate. The life tenant then had no issue, and it was, of course, uncertain whether he would ever have any; and as to the issue which he has sudsequently had, it is yet uncertain whether any of them will be living at his death, and the same uncertainty exists as to whether the residuary legatees and devisees will ever have the right tc take. It is manifest, therefore, that at the time these estates were created, as well as now, it is altogether uncertain, not merely who will, at the termination of the life estate, be entitled to enjoy in possession the remainder, but who has now the *right* to the future enjoyment of such estate. The present issue cannot say that they have any such fixed and certain right, because their right depends upon a future contingency — that of the life tenant dying leaving lawful issue — and they may all die before the life tenants. Nor can the residuary legatees claim any such right, for their right also depends upon a future contingency — the death of the life-tenant without leaving lawful issue — and they cannot claim that they have now a fixed and certain right to the possession when such possession shall become vacant by the death of the life-tenant. One of the tests laid down in the books by which we may ascertain whether a remainder is vested or contingent is to inquire whether the persons claiming such remainder, being *sui juris*, could by uniting with the owner of the particular estate convey a fee sinple title. If he could, such remainder must be regarded as vested; otherwise it is contingent. For if the owner of the right to the immediate possession unites with the owner of the right to the future possession when such immediate possession shall become vacant in conveying the property, then the whole estate, present as well as future, is well conveyed. But if the owner of the right to the future possession is not ascertained, or if his right depends upon the happening of a future event, such right to the future possession could not be well conveyed, and the grantee would necessarily take an imperfect title.

Subjecting this case to the test, it must be apparent that the remainders are not vested, for neither class of remainder-men could by uniting with the life-tenant convey a good title. The issue of the son could not, because if the life-tenant should survive such issue, their conveyance would not carry the title in

remainder; and the residuary legatees and devisees could not, because if the life-tenant should die, leaving any issue their conveyance would not carry the title in remainder, and, therefore, the property would not be well conveyed. As Harper, Ch., says in Dehon *v.* Redfern (Dud. Eq. 118), in speaking of remainders like those under consideration: "They were to the children who should be living at the death of the daughters respectively, or to the children of those who had died leaving children. Until the death of the daughters it must remain perfectly uncertain who will be the persons to take, and this is the definition of one species of contingent remainders." So here the remainder is to the issue of John Lewis Faber, "living at the time of his death;" and in default of such issue, to the residuary legatees and devisees. Until the death of John Lewis Faber it must remain perfectly uncertain who will be the person to take, and hence the remainders are contingent. If so, then it necessarily follows, upon the authority of Redfern *v.* Middleton (Rice, 459), in which the court of errors adopted the reasoning of Chancellor Harper in his circuit decree in Dehon *v.* Redfern (Dud. 115) that the contingent remainders to the issue of John Lewis Faber, and in default of such issue to the residuary legatees and devisees, were barred by the deed of feoffment and livery of seisin to Folker, and by his conveyance to John Lewis Faber and the release of Mrs. Ann Margaret Faber of all her interest, the absolute title was perfected in the said John Lewis Faber.

But, second, it is agreed by the appellant that, even if the remainders be construed to be contingent and not vested, yet the deed of feoffment and livery of seisin could not bar such remainders, because the legal estate was vested in the trustees. This proposition might be admitted if it were true that the legal estate *was* in the trustees. It becomes necessary, therefore, to consider that question. The rule, undoubtedly, is that where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the statute of uses executes the use and carries the legal title to the *cestui que use*. Ramsey *v.* Marsh, 2 McC. 252; Laurens *v.* Jenny, 1 Spear, 356; McNish *v.* Guerard, 4 Strobh. Eq. 66. By the terms of the will under consideration it does not appear that the trustees are charged with any duty whatsoever. The language is "in trust to and for the use, benefit and behoof of my son, John Lewis Faber, for and during the term of his natural life and no longer; and from and immediately after the death of my said son, then and in trust to and for the lawful issue of my said son living at the time of his

death; * * * and should my said son die without leaving lawfully-begotten issue, living at the time of his death, then and in that case I give, devise and bequeath all and singular the lots of land, &c. * * * unto my residuary devisees and legatees, their heirs and assigns forever, to be equally divided between them share and share alike." There is no provision that the trustees shall receive the rents and incomes of the property and pay them over to the son or to his issue after his death, nor is there any provision that the trustees shall have the estate for the sole and separate use of any of the issue who might happen to be married women; in fact no duty whatsoever is imposed upon the trustees.

* * * The other exception taken to the judgment below, that, until administration upon the estate of Mrs. Faber, the plaintiff could not convey the premises, was not insisted upon in the agreement here, and therefore, we infer that it was abandoned. But if we are wrong in this inference, we may say that we do not think this exception would avail the appellant. Mrs. Faber died in 1858 and up to this time no claims have been set up against her estate, so far as we are informed by the record. But certainly if appellant had accepted the title when rendered, and debts aganist the estate of Mrs. Faber should afterwards have been set up, he would have been protected in his title by the statute 3 and 4 W. & M., Chap. XIV. 2 Stat. 536. This, therefore, constituted no valid objection to the title.

The judgment of the circuit court is affirmed. Haskell, A. J., concurred.

Willard, C. J. I regret that we are compelled to give efficacy to an act of wrong on the part of the life tenant in destroying the remainders, and to that extent defeating the intention of the testator. This effect, originally dependent upon purely technical grounds, has become embodied in the laws of our State, and we have no power to deny its force. I am satisfied that at the time of the alienation the remainders were contingent, issue not having been born. As it regards the question whether the limitation to issue living at the death of the first taker gave a remainder that could not vest upon the birth of issue, I do not deem it necessary at the present time to pass upon it. Such a view is not necessarily precluded by Gregg *v.* Seabrook (Seabrook *v.* Gregg, 2 S. C.) but still I think that counsel should be heard on that case before that conclusion is reached.

Since this decision was rendered, in 1877, the legislature of South Carolina passed an act, abolishing the tortious operation of feoffments, so that Faber *v.* Police may be referred to as the

last case on record in the English-speaking world, in which a future contingent estate has been defeated by the life tenant's feoffment in fee. This case is also noteworthy in that, while neither the judges nor counsel nor referee referred to these future contingent limitations as anything but common law remainders, they are in fact contingent uses, taking effect as remainders, and therefore defeated by this tortious feoffment of the tenant for life.

When a Bargain and Sale or Contract of Sale Raises a Use Which is Executed by the Statute of Uses Into a Legal Estate or Only an Implied Trust Which Requires a Formal Deed of Conveyance, in Order to Transfer the Legal Title to Vendee.

Hanks *v.* Folsom, 11 Lea, 555.

COOPER, J., delivered the opinion of the court.

Bill filed February 19, 1880, by the children and sons-in-law of J. A. Cassidy, who is still living, and Martha A. M. Cassidy, his late wife, to recover the possession of certain land. The chancellor, upon final hearing, declared the complainants entitled to the land upon the death of their father. The referees have reported in favor of reversing the chancellor's decree, and dismissing the bill with costs. Both sides have filed exceptions to the report, so as to open the whole case.

J. A. and Martha A. M. Cassidy intermarried in 1858, and had five children, four of whom are complainants, and one of them a defendant to the bill. They lived in Grainger, now Hamblen County. He left his wife and family in 1865, and went to Ohio. He wrote two or three letters to his wife shortly after his departure, and then ceased to write altogether. The wife thereupon addressed a letter to the firm by whom she understood from him he had been employed, and in due course of mail received a reply, purporting to be from the firm, that a dead body had been found in the Ohio river, which was supposed to be that of her husband from certain papers taken from a pocket of the clothing. These papers, consisting of her husband's discharge from the army, seem to have been sent to her. This was early in 1866, and from that time she, and her family and neighbors, believed that he was dead. She was thereafter treated as a widow, and he was not again heard of in the neighborhood until about the middle of the year 1876. She and her children by Cassidy were left in abject poverty. At her instance, her only son by a former marriage, came from a distant county and took charge of her and her children.

About the time the land in controversy, which Martha A. M. Cassidy had inherited from her father in 1858, was set apart to her. It consisted of twenty-five acres of uninclosed and unimproved land. In order to secure a home for her family, she exchanged this land for another small tract in the neighborhood which was improved. In pursuance of the agreement of exchange, on July 16, 1869, she undertook to convey the land in controversy to the defendant, F. W. Taylor, and Taylor caused to be conveyed to her the other tract of land. She took possession of the latter tract, and lived on it with her children until her death on November 7, 1870. In the year 1872, her son by her first husband filed a petition in court against the other children for a sale of the land for partition, and such proceedings were had that in January, 1873, the land was sold, and the title vested in the son by the first marriage, who afterwards sold the land to the defendant Crouch, and at his request conveyed it to Crouch's wife.

Upon the conveyance to him of the land in controversy, F. W. Taylor placed his son-in-law, the defendant, G. W. Folsom, in possession, who fully inclosed it by the first of December of that year, and remained in possession until November 29, 1876, when he sold to the defendant, McFarland, executing to him a bond for title. McFarland at once entered into possession, and has continued in possession ever since.

On January 29, 1880, J. A. Cassiday filed his bill against Crouch and wife to recover possession as tenant by the curtesy, of the land received by his late wife in exchange for the land in controversy. On January 20, 1880, Cassidy in writing surrendered his estate by curtesy in the land in controversy to his children, and on February 19, 1880, the present bill was filed.

The defendants having relied upon the defense of the statute of limitations of seven years, the complainants contend that the instrument in writing by which Martha A. M. Cassidy undertook to convey the land in controversy to F. M. Taylor, did not accomplish that object for want of necessary words of conveyance, and is in any event a mere nullity, because there was no privy examination of the grantor to its execution.

The material parts of the instrument are as follows: "This indenture, made and entered into the 16th day of July, 1869, between Martha Ann Matilda Cassidy of the one part, and Franklin W. Taylor of the second part, witnesseth, that I, the said Martha Ann Matilda Cassidy, have this day, for and in consideration of the sum of $700, bargained and sold to the said Franklin W. Taylor, a certain piece or parcel of land (describing

it), to have and to hold the said tract or parcel of land to the said F. M. Taylor as an inheritance in fee simple forever.

The objection to this instrument is that it contains no words of conveyance, and that the defect is not helped by the *habendum* clause, which, it is said, can only be looked to in order to define, qualify or control the estate conveyed. The operative words in the premises of this intrument are "bargained and sold." More than half a century ago, Chancellor Kent, in lectures which have done honor to our country, did not hesitate to say that a deed would be perfectly competent to convey land in any part of the United States, in which one person undertook, for a recited consideration, to "bargain and sell" to another a lot of land, describing it. And the highest court of at least one of our sister States seems to have judicially held such to be a deed good: 2 Dana (Ky.), 23. In this State, for over thirty years, it has been provided by statute that every grant by deed of real estate shall pass all of the estate of the grantor "unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument." Code, Sec. 2006. And the legislature, by the Code, Sec. 2013, has reduced the forms of conveyance to their simplest elements, and disclosed a clear intent that the largest meaning shall be given to words in grant, unless limited by the instrument itself. Daly *v.* Willis, 5 Lea, 104. And our decisions have been, in effect, that the whole instrument will be looked to, without much reference to technical rules, to ascertain the intent of the parties. The same words may be construed as an agreement to convey, or as operating an actual conveyance according to the intention of the parties to be gathered from the context. Beecher *v.* Hicks, 7 Lea, 211; Carnes *v.* Apperson, 2 Sneed, 562; Topp. *v.* White, 12 Heis. 165, 173; Alderson *v.* Clears, 7 Heis. 667; Lafferty *v.* Whitesides, 1 Swan, 123. It is impossible to read the instrument under consideration without seeing that it was intended as a deed of conveyance of the land in fee, and the word "sell" in the present, or "sold" in the past tense, equally import an executed contract unless limited by the context or character of the instrument. We are clearly of opinion that the words used in the instrument under consideration were sufficient, in view of the plain intent of the parties, to convey the land to the grantee in fee.

This court has uniformly ruled since the act of 1819, and has repeated the ruling at this term, that the meaning of the statute of limitations in favor of the tenant in possession does not depend upon the validity of the assurance of title under which he claims. If it be in form an assurance of

title purporting to convey an estate in fee, although void both at law and in equity, the statute will perfect the title within the period of limitations. Continuous adverse possession is the important point, the assurance of title being necessary to ascertain the land, and to determine the estate acquired. Hunter *v.* O'Neal, 4 Baxt. 474; Thurston *v.* University, 4 Lea, 513. The point is made that the deed of a married woman is not rendered effectual by signing and delivery, but only by her privy examination. And, therefore, says the learned counsel, the question we make is not that the deed was void and inoperative merely, but that it was no deed at all. The distinction is a nice one, and perhaps we may be reasonably excused if we fail to see it. But the very point now relied on was made over a quarter of a century ago in a case involving the construction of the act of the legislature passed to cure defective probates after a registration of twenty years, and found one judge of this court who thought it well taken. A majority of the court held, however, that there was no distinction between the deed of a *feme covert* and any other deed with a defective probate, although it was conceded the title did not pass for the want of a proper privy examination. Matthewson *v.* Spencer, 3 Sneed, 513. This decision has been repeatedly followed: Murdock *v.* Leeth, 10 Heis. 166; Anderson *v.* Bewley, 11 Heis. 29; Stephenson *v.* Walker, 8 Baxt. 289. For a much stronger reason the ruling should be applied in a class of cases strictly analogous where time is supplemented by continuous adverse possession for the required period.

The disseisin occasioned by the possession taken under the deed of Martha A. M. Cassidy was of the joint estate of Cassidy and wife, and their joint right of action was barred by the continuous adverse possession of Taylor for seven years, and the title thus acquired was sold to McFarland. Guin *v.* Anderson, 8 Humph. 298. And the heir of the wife has only three years after her death, or at any rate after the right of the surviving husband is barred. *Id.* The right and title of the husband was not only barred, but extinguished and interposed no obstacle to a suit by his children. McClung *v.* Sneed, 3 Head, 219. His subsequent conveyance or surrender to his children passed nothing to them. And their right of action as heirs of their mother was also barred and extinguished by a failure to sue in the prescribed time.

It is probable also that the conclusion of the referee may be sustained upon the doctrine of estoppel, as assumed by them, if not upon the implied fraud of the married woman in representing herself as *discovert*, at any rate, upon the ground that the

complainants, although infants and *feme covert*, have ratified the act of the mother by accepting the property given in exchange, and not offering to return the property given in their bill. Stormer *v.* Ditwaller, MS. opinion at Knoxville, September term, 1878. It would be manifestly inequitable to give them both tracts of land, and it is not easy to see how they can do equity after having sold, even through proceedings in court, the tract received by them. It is, however, unnecessary to further consider this point.

The chancellor's decree will be reversed, and the bill dismissed with costs.

Resulting Trust to Grantor or Testator's Heirs, After Performance of Express Trust.

Buffington *v.* Maxam, 152 Mass. 477; 25 N. E. 975.

Appeal from supreme judicial court, Bristol County; Charles Allen, Judge.

Petition by Phebe A. I. Buffington for an accounting by Harriet Maxam as trustee of the estate of Borden C. Tallman, deceased. At his death said Tallman left, surviving him, three daughters, — the petitioner, the respondent, and the third daughter Caroline E. Tallman. By his will he disposed of his property in the following words: "(1) To my Harriet I give my half of the farm, together with produce, stock, and farming implements thereon, and the rest and residue of all my property, whether real or personal, of whatever name or nature, for the support of my daughter, Caroline E., except the following legacies. (2) To my daughter Phebe Ann I give five dollars. (3) To my daughter Caroline E. I give five dollars." Under a decree of this court that Harriet took the residue in trust for the support of Caroline, Harriet filed a bond as such trustee. On the death of Caroline, Phebe filed this petition for an accounting, and from the decree of the judge of probate ordering that an account be filed, the respondent appealed. At the hearing of her appeal the decree was affirmed, and from this decision respondent again appeals.

Knowlton, J. The decision of this case depends on the construction of the first clause of the will of Borden C. Tallman, which is as follows: "To my [daughter] Harriet I give my half of the farm, together with produce, stock, and farming implements thereon, and the rest and residue of all my property, whether real or personal, of whatever name or nature, for the support of my daughter Caroline E., except the following legacies." It has already been decided that under this clause the

respondent, Harriet Maxam, took an absolute estate in one-half of the farm together with the produce, stock, and farming implements, and that she received the rest and residue in trust to use it for the support of Caroline E. Tallman. Buffington *v.* Maxam, 140 Mass. 557 ; 5 N. E. Rep. 519. Caroline E. Tallman having deceased, the question arises whether the remainder is to be divided between the two daughters of the testator as intestate property, or whether the respondent takes the whole of it under the will. If the respondent took no interest in it except as trustee, the petition was rightly brought, and the decree must be affirmed. The question to be determined is whether the respondent took the property upon a trust or subject to a trust. If upon a trust she took no beneficial interest, and when the purposes of the trust are accomplished, the remainder goes, under a resulting trust, as property undisposed of by the will. If subject to a trust, the beneficial interest was in her, subject to a legal duty to support her sister, and, that duty having been performed, she holds the remainder absolutely. If we take the language of the will literally, the property was given to the respondent for the support of the testator's daughter Caroline E., and for no other purpose. Under a former decree of the court, the respondent has filed a bond as trustee. The testator's relations with all his daughters were friendly, and no reason appears why he should wish to disinherit the petitioner. He gave a substantial gift of real and personal property to the respondent, with legacies of only five dollars each to the petitioner and to Caroline. The rest of his estate consisted of $12,000 in personal property, and this he gave to Harriet for the support of Caroline. It seems fair to conclude that he did not intend that Harriet should hold this otherwise than under the trust declared in the will. Loring *v.* Loring, 100 Mass. 340. As was said in the former decision, the will is obscure and inartificially drawn, and, in interpreting it, we must consider the attending circumstances. We can hardly believe, under the circumstances of this case, and in the absence of language clearly expressing it, that the testator intended to give Harriet the remainder of this large legacy on the death of Caroline, in addition to other property given her, and to leave Phebe with only five dollars. We are of opinion that the respondent took no interest in this legacy under the will except as trustee, and that the remainder, upon the settlement of the trustee's account, must go, under a resulting trust, to the testator's personal representatives, who are his two daughters, the petitioner and the respondent. Decree affirmed.

Resulting Trust to Party Paying the Consideration.

Burdett *v.* May, 100 Mo. 13; 12 S. W. 1056.

Error to circuit court, Livingston County; J. M. Davis, Judge.

Action by Sarah Burdette and others against James May and others to establish a resulting trust. Plaintiffs allege that defendant James May entered the land in his own name, when it should have been entered in the name of his mother, she having furnished the money to buy the land. Rev. St. Mo., § 3219, prescribes that actions for the recovery of real estate must be brought within 10 years from the time the cause of action accrued, and section 3222 prescribes that if the person entitled to sue be under disability the action may be brought within three years after the disability is removed, provided no action shall be brought after 24 years from the time the right of action accrued.

SHERWOOD, J. 1. This case may be ruled on two points, either of which are decisive: (1) The insufficiency of the testimony to establish a resulting trust; and, (2) the statute of limitations. The rule which prevails in this State, the general rule elsewhere upon the subject of resulting trusts, requires that in order to prove such a trust it must be established by testimony so clear, strong, and unequivocal as to banish every reasonable doubt from the mind of the chancellor respecting the existence of such trust. This is the substance and effect of the language employed by the authorities and by this court in numerous instances. Johnson *v.* Quarles, 46 Mo. 425; Forrester *v.* Scoville, 51 Mo. 268; Ringo *v.* Richardson, 53 Mo. 385; Kennedy *v.* Kennedy, 57 Mo. 73; Gillespie *v.* Stone, 70 Mo. 507; Philpot *v.* Penn, 91 Mo. 38; 3 S. W. Rep. 386; Berry *v.* Hartzell, 91 Mo. 132; 3 S. W. Rep. 582. The testimony in this cause, it will be observed, is made up, for the most part, of the verbal admissions of the party against whom the resulting trust is sought to be established. Touching the subject of such admissions, and the weight to be given them, Greenleaf states: "The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." 1 Greenl. Ev., §§ 45, 97, 200. And

those admissions were made when? Certainly, prior to August 15, 1848, the date of the patent to James May, since which time he has occupied the premises, paid taxes, made improvements, bought and sold, and managed the place as if it were his own. The fact that his father and family lived upon the place for a number of years along with James May argues nothing against his title, especially when considered in connection with the relationship between the parties, and other facts in evidence. William May, a brother, worked for James May on the farm, and for the years 1857 to 1859, was paid by James $400 for his labor, and went away, and remained away from the place ever since, with the exception of a visit to the place in 1865, when he took away, on a visit to Gallaway County, his mother, whom he found living at James' house. None of the children claimed the place, or set up any opposition to the title of James; and it is truly remarkable that William May should accept wages from his brother, if he knew he was as much entitled to the place as his brother. Indeed, he as well as Graham and his wife, have refused to join in the present suit, and therefore were made parties defendant. It is so natural that parties having a right to property should assert it, should continue to live upon it, after once having lived there, that the fact that they have done neither must weigh heavily against the probability of the justness of their claim, when asserted after so many years of silence, non-claim, and abandonment. None of the present claimants, so far as appears, live on the property in dispute, or did so at the time of the mother's death, which occurred in 1865, her husband having died in 1863. And, from testimony introduced on behalf of the real defendant, James May, it appears that his mother made, in 1881, to one of her neighbors and intimate friends, the statement that the place was given to him as a recompense for staying with his parents, and caring for them in their old age. And the testimony of William May goes to strengthen this view, because he says that on a difficulty springing up between himself and brother James, in 1857, about working, that his mother told James that the place was hers during her life, etc. Now, if these statements by the mother were made, they being statements of the equitable owner then in possession, according to plaintiff's theory, they were competent testimony; and, admitting that defendant James May did make the verbal admissions heretofore ascribed to him, they are not inconsistent with the statements of his mother. Besides, it must be borne in mind that the present proceedings were instituted over eighteen years after the death of the mother, who knew all about the transaction. Courts of

equity view with disfavor suits that are brought long after the transactions litigated have occurred, and long after death has sealed the lips of those familiar with the occurrences so remote in point of time. State *v.* West, 68 Mo. 229; Lenox *v.* Harrison, 88 Mo. 491, and cases cited. For these reasons it must be held that the claim of plaintiffs has not been established in the manner demanded by the authorities heretofore quoted.

2. In addition thereto, the claim of the plaintiff is barred by the statute of limitations. That statute, although it will not, as a rule, run against technical or express trusts, yet it will do so from the time when the facts constituting a resulting trust are brought home to the *cestui que trust.* Buren *v.* Buren, 79 Mo. 538, and cases cited. In the case at bar, as the cause of action accrued in 1848, Mrs. May, the mother, only became discovert in 1863. Her disability prior to the latter date prevented the statute from running against her, inasmuch as the time specified in the proviso of section 3222 had not expired. That is to say, the twenty-four years mentioned in the proviso had not elapsed between the time the right of title of Mrs. May first descended or accrued to her and the period when she became discovert. Ang. Lim. (6th Ed.), § 477, and notes; Hunt *v.* Wall, 75 P. St. 413; Warn *v.* Brown, 102 Pa. St. 347; Bradley *v.* Burgess, 10 S. W. Rep. 5; Medlock *v.* Suter, 80 Ky. 101; Mantle *v.* Beal, 82 Ky. 122; Valle *v.* Obenhause, 62 Mo. 81. Consequently, whatever right or title she had originally remained at her husband's death. But, as the statute began to run in 1863 against her, no subsequent disability or existing disability of those who afterwards became her heirs could stop its course. The saving clause only extends to the person on whom the right of action first descends, or to whom the cause of action first accrues. Ang. Lim., §§ 477, 478, *et seq.;* Landes *v.* Perkins, 12 Mo. 238; Cunningham *v.* Snow, 82 Mo. 587; Williams *v.* Dongan, 20 Mo. 186; Swearingen *v.* Robertson, 39 Wis. 462; Bozeman *v.* Browning, 31 Ark. 364; Wood Lim., § 251 *et seq.*, and cases. The heirs, then, of Mrs. May must be regarded as barred in the same length of time from the date when she became discovert as she would, had she lived, to wit, three years. On either of the grounds aforesaid the judgment should be affirmed.

Trust Established for the Purpose of Preventing the Attachments of Claims of the Creditors of Cestui que Trust.

Wemyss *v.* White, 159 Mass. 484; 34 N. E. 718.

Report from supreme judicial court, Suffolk County.

Bill in equity by James Wemyss, Jr., against Charles G.

White and others, trustees under the will of B. F. White, deceased, to compel defendants to apply the income of the estate to the payment of a certain order and mortgage executed to plaintiff by H. G. White, the beneficiary under the will. Case reserved and reported to the full bench. Bill dismissed.

Lathrop, J. It was held, after much consideration by this court, in Bank *v.* Adams, 133 Mass. 107, that a person having the right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event. This case distinctly repudiated the doctrine of the English courts of equity, which is "that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by and liable in equity to the debts of, the *cestui que trust;* and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts." *Id.* 127, per Morton, C. J. As the English doctrine does not obtain in this commonwealth, we have no occasion to consider the numerous cases cited from the English reports in support of the plaintiff's contention. The effect of the decision in Bank *v.* Adams is to put an equitable *cestui que trust* upon the same footing as a married women under the English decisions. The question in every case is whether an equitable *cestui que trust* takes an absolute, unqualified interest, which he can assign, and which can be reached by his creditors, or whether he takes merely a qualified interest, over which he has no power until the property, principal, or income comes into his possession. The question is determined by ascertaining the intention of the creator of the trust, it being held in Bank *v.* Adams that the intentions of the creator of the trust "ought to be carried out, unless they are against public policy," and that the power of alienating in advance is not a necessary attribute or incident of a qualified estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements. *Id.* 173. In Bank *v.* Adams the intention was expressed in clear and unequivocal words. The gift was of a certain sum of money to executors, in trust, to invest and pay the net income thereof to a brother of the testator, "free from the interference or control of his creditors;" the testator declaring his intention to be "that the use of said income shall not be anticipated by assignment." See also, Claflin *v.* Claflin, 149

Mass. 19; 20 N. E. Rep. 454; Billings *v.* Marsh, 153 Mass. 311; 26 N. E. Rep. 1000. "Such provision need not be in express terms, but it is sufficient if the intention is fairly to be gathered from the instrument when construed in the light of the circumstances." Baker *v.* Brown, 146 Mass. 368, 371; 15 N. E. Rep. 783; Slattery *v.* Watson, 151 Mass. 265; 23 N. E. Rep. 843. The case at bar resembles very closely that of Hall *v.* Williams, 120 Mass. 344. There the residue of the property was devised to trustees to pay the balance of the income, after paying certain annuities, in equal parts to the seven children of the testator. Then followed a provision that, if either of the recipients should be "wanting in thrift or care, or a sound discretion in the use of money," the trustees were "charged with paying and disbursing the same in such way or ways as shall be most likely to make the same inure and be beneficial" to such recipient. It was held that this vested in the trustee a large discretion as to the time and manner of payment, and that a child could not assign or otherwise dispose of his share of the income in advance of its payment to him. In the case at bar the trustees may "at any time, in the exercise of their discretion, discontinue the payment of the income, and apply the same in such way as they deem best for the beneficiary's support and maintenance." It follows that the beneficiary did not have an absolute right to the income which he could alienate in advance, but as was said in Bank *v.* Adams, "only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property." St. 1884, c. 285, does not change the rule laid down in Bank *v.* Adams, and Billings *v.* Marsh, *ubi supra;* and we find nothing in the cases of Ricketson *v.* Merrill, 148 Mass. 76; 19 N. E. Rep. 11; and Wilson *v.* Fire-Alarm Co., 151 Mass. 515; 24 N. E. Rep. 784, cited by the plaintiff, which intimates the contrary.

The plaintiff further contends that, as one of the trustees resigned and another was appointed in his place, the present trustees cannot exercise any discretion, and that the interest of the beneficiary is therefore absolute. By the express terms of the statute, the new trustee has "the same powers, rights, and duties * * * as if he had been originally appointed." Pub. St., c. 141, § 6. The discretion given to the trustees is a part of the trust, to be exercised by them as long as the trusts shall continue. It cannot be considered as merely a personal confidence in the persons named as trustees. Nugent *v.* Cloon, 117 Mass. 219, 221; Bradford *v.* Monks, 132 Mass. 405, 407; Schouler Petitioner, 134 Mass. 426, 428. Bill dismissed.

NOTE. — St. 1884, c. 285, provides as follows: "A bill in equity may be maintained to reach and apply in payment of a debt any property of a debtor, as provided by clause 11, section 2, of chapter 151, of the public statutes, notwithstanding the fact that * * * it cannot be reached and applied until a future time."

What Writing Will Satisfy the Requirements of the Statute of Frauds in the Creation of Trusts.

Hutchins *v.* Van Vechten, 140 N. Y. 115; 35 N. E. 446.

Appeal from Supreme Court, general term, first department.

Action by Elizabeth E. Hutchins, as executrix, etc., against Abraham Van Vechten, to have adjudged that defendant held certain real property, and the proceeds arising from the possession thereof, in trust for the joint and equal benefit of himself and plaintiff's testator. From a judgment of the general term (20 N. Y. Supp. 751) affirming a judgment for plaintiff, defendant appeals. Affirmed.

O'BRIEN, J. The judgment in favor of the plaintiff in the courts below adjudges that the defendant, under a deed of conveyance to him by Reuben E. Fenton on the 23d day of December, 1870, of certain lands in the county of Chautauqua, then became and was, and ever since has been, seized and possessed thereof, and of the proceeds, rents, issues, and profits, in trust for Waldo Hutchins, the plaintiff's testator, to the extent of an equal undivided one-half part thereof, as tenants in common. It appearing that the defendant, before the commencement of the action, had sold the land, the title to which he held in his own name, an accounting concerning the proceeds and the rents and profits was directed before a referee designated in the judgment. There is little, if any, dispute with reference to the facts, and practically the only question presented by the appeal is whether the trust impressed by force of the judgment upon the defendant's title was sufficiently or legally established. The defendant relies upon the provisions of the statute of frauds concerning trusts of this character, and it therefore becomes necessary to determine whether the plaintiff's proofs are such as that statute requires. The English statute on this subject (29 Car. II., c. 3), in its essential features, was enacted in this State by the act of February 26, 1787, the twelfth section of which provides that "all declarations or creations of trusts of any lands shall be manifested and proved by some writing signed by the party entitled by law to declare the trust. Thus the law stood for about forty years, until the general revision of the statutes, when it was

changed, and made to read as follows: "No estate or interest in lands, other than leases for a term not to exceed one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." 2 Rev. St., p. 135, § 6. After the revision a trust of the character claimed by the plaintiff in this case could not be created or established except by a deed or conveyance in writing. But by chapter 322 of the Laws of 1860 the legislature restored the law to its original condition by an amendment to the seventh section substantially providing that a declaration of trust in lands might be proved by any writing subscribed by the declaring the same. It is not necessary now to produce a deed or a formal writing intended for the purpose in order to prove the trust, but letters or informal memoranda signed by the party and even admissions in a pleading in another action between other parties if signed by the party, with knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest. Forster *v.* Hale, 3 Ves. 696; Fisher *v.* Fields, 10 Johns. 494; Wright *v.* Douglass, 7 N. Y. 564; Cook *v.* Barr, 44 N. Y. 156; Loring *v.* Palmer, 118 U. S. 321; 6 Sup. Ct. 1073; 2 Story Eq. Jur., § 972; McArthur *v.* Gordon, 126 N. Y. 597; 27 N. E. 1033; Urann *v.* Coates, 109 Mass. 581.

The evidence produced in behalf of the plaintiff was sufficient, within this rule, to establish an interest in the lands by her testator at the time of his death, which occurred on the 9th day of February, 1861. The conveyance to the defendant was shown by the production of the deed, which appeared to have been recorded in the proper clerk's office December 3, 1875. The plaintiff produced and put in evidence three papers found in an envelope in the safe of Mr. Hutchins after his death, and which were shown to have been in his possession during his life: (1) A power of attorney under the hand and seal of the defendant to John H. Platt who was at the time of its execution the law partner of the deceased, bearing the date June 5, 1873, acknowledged before a notary public in the city of New York, who also became a subscribing witness thereto. This instrument authorized and conferred full power upon Platt to sell the land for $8,000, payment to be made in the manner and as specified therein. (2) A letter in the defendant's handwriting, and bear-

ing his signature, of the same date as the power of attorney, addressed to Platt, in which, after referring to the power of attorney, and giving instructions permitting him to take certain notes for the purchase price of the land, the defendant says: "Whatever is realized, you will understand that it belongs to Waldo Hutchins and myself, jointly and equally; and any further instructions Mr. Hutchins may give you, you may comply with." (3) Another paper unsigned, but wholly in the defendant's handwriting, describing the land conveyed to him by Fenton. It begins with the statement that the "deed from Fenton to me is a warranty deed, with full covenants," and, after the description, ends with the statement that "the above is the description of the property as contained in a deed to me; nothing about our being entitled to 600 inches." The plaintiff also produced several letters written by the defendant to the deceased and one of his sons, after the execution of the power of attorney, in regard to taxes on the land; also, a letter written by the defendant to E. H. Fenton, then a tenant of a portion of the land, bearing date February 14, 1887, in which the defendant states that, "although the title of the whole property is in me, there is another party who has an interest. I expect to go to New York some time next week, when I will see him, and let you know what it is decided to do" It is not necessary to the plaintiff's case to show that the trust was created by, or originated in, a writing. The statute enacts a rule of evidence, and is satisfied if the trust is manifested or proved by a writing, however it originated, whether by parol arrangement or otherwise. Crane *v.* Powell, 139 N. Y. 379; 34 N. E. 911. The defendant's letter to Platt refers to the power of attorney, and that refers to the deed under which the title was held; giving its date, and the parties to it. Both are signed by the defendant and reading them together, as they should be, the subject-matter and extent of the trust is sufficiently defined and specified, even without the unsigned paper and other letters. This proof is sufficient to sustain the findings of the learned trial judge, to the effect that the defendant took and held the title to the land in his own name, but in trust for the benefit of himself and the plaintiff's testator, in equal shares, as tenants in common. It was not, of course, one of the express trusts authorized by statute, but one arising under the forty-seventh section, which, in equity, entitled the deceased to a beneficial interest, and vested in him an estate of the same quality and duration as such interest. Ellwood *v.* Northrup, 106 N. Y. 172–179; 12 N. E. 590.

We agree with the learned counsel for the defendant that a

trust cannot be impressed upon what appears by the deed alone to be an absolute title in the defendant, without clear proof showing a beneficial interest in another, as well as its nature, character, and extent, and that a failure to execute or deliver the necessary legal evidence to qualify the title is fatal to such a claim. Wadd *v.* Hazelton, 137 N. Y. 215; 33 N. E. 143; Van Cott *v.* Prentice, 104 N. Y. 45; 10 N. E. 257. With this point clearly in view, we have carefully considered the very able argument of counsel in behalf of the defendant, mainly devoted to the proposition that the proof in this case does not come up to the standard which the law demands in such cases. But we think that the written evidence produced at the trial is not fairly open to any construction except that given to it by the learned trial judge, and is consistent only with the theory that the deceased had in fact a beneficial interest in the lands. The defendant stated under his own signature, when authorizing his attorney in fact to sell the property, that he was entitled to one-half the price, and directed the attorney to consult with him in regard to the execution of the agency. There is nothing in the case to warrant the belief that this division of the proceeds of the sales, when made, referred to compensation as a broker, or to anything else, save an interest in the property to be sold. That is the natural conclusion which the judicial mind must reach upon reading the letters and papers in the light of all circumstances. The trust, it is true, must be established wholly by a writing sufficient within the statute; but, when the writing is produced, it must be interpreted, like all other contracts and written instruments, according to the intention of the parties ascertained from the language used, and all the surrounding circumstances. The fact that no proof was given by the plaintiff of payment by the testator of any part of the consideration is not material. It is not always possible, after the death of the party interested, to give such proof, and it is not essential to the process of establishing the trust. A writing without any consideration whatever affords sufficient proof that the title conveyed by the deed is for the benefit of another. The unsigned paper and the letters of the defendant bearing date subsequent to the power of attorney, and the letter which accompanied it, relating to the taxes on the land, and the nature of the defendant's interest therein, were properly admitted in evidence. They were all in the defendant's handwriting, presumptively sent or delivered by him to the deceased; and they explained, and tended to confirm, what the defendants had stated in the first letter in regard to the interests of the parties in the lands.

There are some other exceptions in the record, but it is not

necessary to refer to them in detail. It is sufficient to say that we have examined them all, and have found nothing in them that would warrant us in disturbing the judgment, and it should therefore be affirmed with costs. All concur, except Peckham, J., not sitting.

Appointment of Trustees to Fill Vacancies, Due to Resignation or Refusal to Serve.

Brandon *v.* Carter, 119 Mo. 572; 24 S. W 1035.

Opinion by BARCLAY, J.

This is an action of ejectment. In the petition it is alleged that plaintiff was duly appointed trustee for John T. Jacobs and his children by virtue of the will of George R. Jacobs, deceased; that he accepted said appointment and qualified as trustee; that as such he was on the 7th day of March, A. D. 1888, entitled to the possession of a certain tract of land, which defendant, Mr. Carter, and his tenant, Mr. Kelly, then occupied, and which they unlawfully withhold, etc. The petition contained the usual allegations in ejectment, and asked judgment for possession, rents, profits, etc. The answer admitted the possession of defendants, and denied generally the other allegations. The cause ultimately reached the Audrain circuit court by change of venue, and was there tried before Judge Hughes and a jury. Plaintiff introduced the will of Dr. George R. Jacobs, and a codicil thereto. Dr. Jacobs was the father of John T. Jacobs and grandfather of the latter's children, for whose use and benefit this action was brought. He died in 1877, possessed of the land which forms the subject of the action. Defendants claim by a title derived from the said John T. Jacobs through a sheriff's sale and deed, conveying to the defendant, Mr. Carter, all the right, title and interest of John T. Jacobs in and to the land in question. It is conceded by both parties that under the will of his father John T. Jacobs was the beneficiary of one undivided fourth part of said land for and during his life, and that his children were beneficiaries of the remaining three-fourths. After making his will, the testator, Dr. Jacobs, signed an absolute deed to John T. Jacobs, conveying to him a fee-simple title to the whole land; but plaintiff denied that this deed was ever delivered to the grantee, John T. Jacobs. Upon this proposition there was a conflict of testimony. The jury, under instructions of the court, found in favor of plaintiff on this issue. That decision is not sought to be reviewed, and is no longer controverted. The

deed, being thus decided inoperative, left John T. Jacobs with no other or greater title than that conferred on him by the will, viz., a beneficial, undivided, one-fourth interest during his life, which, by virtue of the purchase and sheriff's deed, has been acquired by the defendant Mr. Carter. By the will of Dr. Jacobs, Robert B. Price, of Columbia, was named as trustee to hold said land in trust for the use of John T. Jacobs and his children, in the shares above indicated. The will, as modified by the codicil, declared that during the life of John T. he and his children should enjoy the rents and profits of the land in the proportions aforesaid, and at his death it should be the duty of the trustee to convey the land to his descendants. Furthermore, that if John T. preferred to live on the estate, and cultivate it, the trustee should allow him to do so, without charging him rent therefor. As part of plaintiff's case he introduced the record of a proceeding in the circuit court of Callaway County (where the land is situated) appointing him trustee to hold said land under the terms of the will of Dr. George R. Jacobs, in the stead of Mr. Robert B. Price, who had never accepted the trust. That proceeding was instituted at the November term, 1887, by John T. Jacobs and his children, who were then minors. These parties joined in a petition to the circuit court, stating the nature and extent of the trust substantially as above (but with greater particularity); that Robert B. Price, the trustee named in the writ, "refused, failed, and declined to accept the office and trust as said trustee, and no one is now authorized to take charge of said property;" that certain of the petitioners (naming them) were minors, and that all of them were interested in the rents of said land; and praying the court to "appoint some suitable person to act as trustee under said will, and take charge and manage said real estate," etc., and for general relief. This petition was signed by attorneys appearing for the petitioners, but no guardian or next friend for the minors was appointed. Upon consideration of the petition, the court, November 28, 1887, made an order "that Francis Brandon [the plaintiff who brought the action now at bar] be, and he is hereby, appointed trustee in this case." Mr. Price was not a party to that proceeding, and defendants claim that it was insufficient to vest the title to the land in plaintiff, as trustee under the will; but the trial judge overruled that contention. There was evidence to support the other issues on plaintiff's part, namely, as to the possession (by defendant and his tenant) of the land in controversy, and as to plaintiff's demands for rents, profits, damages, etc. The defendants offered considerable evidence, chiefly directed to the question of the delivery of the deed of Dr. Jacobs

to John T. Jacobs during the lifetime of the former; but, as that issue was found for plaintiff, and is not made the subject of exception, the instructions and rulings on that branch of the litigation need not be set forth. The jury found for the plaintiff, and assessed damages and monthly rents as stated in the opinion. Judgment was entered accordingly, and defendants appealed, after an unsuccessful motion for a new trial. The other essential facts appear in the opinion.

1. The first assignment of error disputes the correctness of the ruling of the trial court touching the standing of the plaintiff as trustee under the will of Dr. George R. Jacobs. By that will another person was originally named as trustee, but plaintiff was substituted in his stead by the action of the circuit court upon a proceeding for that purpose. That action defendants attack on the ground that Mr. Price, who was named as trustee in the will, was not a party to the proceeding. By the statute of Missouri (Rev. St. 1889, § 6561), adopting the great body of the common law as part of our jurisprudence (so far as it is not repugnant to our local positive law), our courts are invested with certain general powers, sometimes called inherent, in respect of certain topics, among which is that of trusts. These powers form an acknowledged part of the jurisdiction of our courts. Among them is the power to appoint a trustee when a trust has been created by will, as in the case at bar, and for any cause there is need of a person to perform it; for it is a rule of chancery jurisprudence, which has passed into a maxim, that a trust will never be allowed to fail for want of a trustee. There is a statute providing for the summary appointment of trustees in certain states of fact (Rev. St. 1889, §§ 8683, 8684); but those sections do not, by their terms, purport to apply to trustees under wills. Moreover, it is settled law in that State that a statutory jurisdiction or remedy does not extinguish an ancient jurisdiction of the courts of equity over the same subject, where there is nothing in the statute to indicate such a legislative purpose. The circuit court therefore has jurisdiction, in case of a vacancy, to supply a trustee to assume the trust defined by the will of Dr. Jacobs in his devise for the benefit of his son and grandchildren. But was there a vacancy? The petition of the beneficiaries alleged that there was, charging that Mr. Price had refused and declined to accept the trust. The court, acting on their allegations, necessarily must have found them to be true, by its order appointing plaintiff as trustee. If there was a vacancy on account of Mr. Price's refusal to accept the trust (as stated in the petition), the title

to the trust estate never vested in him. In that event he was not a necessary party to the proceeding for the appointment of the trustee to fill the place he had declined. "If a bill should contain certain allegations which show that persons who otherwise would ordinarily be proper parties have no interest in the controversy, and have no title to and make no claim to any interest, such allegations in the frame of the bill, if well founded, will dispense with the necessity of their being made parties." Story Eq. Pl. (1892, 10th Ed.), § 214a. Our code sheds no light on this point, leaving the question who are "necessary" parties open for construction. Rev. St. 1889, § 1993. Acceptance of a trust is necessary to the vesting of title in the trustee. It may be often implied, or established by inference; but there is absolutely nothing before the court in the present case on which to predict an inference that Mr. Price ever accepted the trust in question. Disclaimer may be established by acts, or by nonaction long continued (Trask *v.* Donoghue [1826], 1 Aik. 370; In re Robinson [1867], 37 N. Y. 261), and, when found by a competent court, dispenses with the necessity of making the disclaiming trustee a party to the proceeding to supply one. Should such action be taken upon a false suggestion to the court, the trustee, or any other interested person, injuriously affected thereby, might proceed (by direct methods) to set the court right. But such an appointment, at the instance of beneficiaries, being a subject-matter within the general powers of a court of equity, cannot be successfully attacked collaterally where the subject of the trust is within the jurisdiction of the court. The defendant in the present litigation claims no title derived through Mr. Price. His only right in the estate is as the purchaser of such interest as John T. Jacobs enjoyed as beneficiary, and the latter was one of the petitioners for the appointment of a trustee. We coincide for the above reasons, in the opinion of the learned trial judge that Mr. Price was not a necessary party to the proceeding in which plaintiff was appointed trusteee of this trust estate.

2. But it is then insisted that the proceeding is fatally defective because the minors therein were not represented by any guardian, curator, or next friend, as required by law. There are at least two answers to that proposition. First: The father of these minors was their natural guardian. Rev. St. 1889, § 5279. He was joined with them as plaintiff, and was authorized (in the absence of any showing that they had a curator) to represent them in all legal proceedings. *Id.*, §§ 1997, 5298. The fact of this relationship appeared on the face of the petition for the appointment, and so there was a substantial compliance with the

requirements of law. Second. Our statute of amendments declares that a judgment shall not be stayed or reversed (and for stronger reason can it not be avoided collaterally) on the ground that any party under 21 years of age appeared by attorney, if the verdict or judgment be for him. Rev. St. 1889, § 2113; Robinson *v.* Hood (1878), 67 Mo. 660. Having thus considered all the objections to the validity of the appointment of plaintiff as trustee, we conclude that the trial judge was entirely correct in holding that appointment good against the collateral attack that has been made upon it.

3. The instruction for plaintiff as to the extent of the recovery is next challenged, because it is supposed to warrant a verdict for the full rental value of the premises, whereas it is said that defendant Mr. Carter was at least entitled to one-fourth thereof as successor to the rights of John T. Jacobs under the will of his father. The instruction reads as follows: "The court instructs the jury that if they find for the plaintiff the measure of damages should be the rental value of the land from the 7th day of March, 1888, to the present time, not to exceed $2,000; and the jury should find for the monthly rents not exceeding $100 per month." It may be that this language is susceptible of the construction defendants seek to put upon it. But, on the other hand, the result leaves it very plain that the jury were not misled by it in the particular complained of, as will appear. Along with it was another declaration by the court, given at defendant's instance, to this purport, viz.: "The court instructs the jury that under the pleadings and the evidence in the case defendant is entitled to the possession of an undivided one-fourth of the land in question, whether the deed from Dr. Jacobs to John T. Jacobs was delivered or not; and the verdict in no event could be for plaintiff for more than three-fourths of the land." And the verdict of the jury is in these words: "We, the jury, find for the plaintiff as to the three-fourths of the land described in the petition, and we assess the damages of plaintiff at the sum of $1,200; and we further find the value of the monthly rents and profits of said three-fourths of said land to be $33 1-3." The evidence as to rents and profits is not preserved for review. The bill of exceptions states that the plaintiff gave evidence tending to prove the issues on his part, and the defendants on their part. We must hence presume the verdict supported by sufficient testimony. Johnson *v.* Long (1880), 72 Mo. 210. But beyond that presumption the verdict plainly indicates on its face that the jury found for plaintiff only for a three-fourths interest in the property, and thus intended to and did give defendants the full

benefit of the rule of recovery stated in their own instruction. Hence there is no substantial ground for complaint by them in that branch of the case. Plaintiff does not complain of the defendants' instruction, so we need not inquire whether it was precisely accurate as defining his rights. The verdict and judgment certainly conceded to defendants all they can justly claim on that point. This court is not authorized to reverse a judgment on account of any error of the trial court, which, in the result, was not prejudicial to the substantial rights of the adverse party on the merits. Rev. St. 1889, §§ 2100, 2303. The judgment should be and is affirmed.

Black, C. J., and Brace, J., concur. Macfarlane, J., having been at one time of counsel, did not take part.

CHAPTER XIV.

EXECUTORY DEVISES.

Brattle Sq. Church *v.* Grant, 3 Gray, 142.
Mead *v.* Maben, 131 N. Y. 255; 30 N. E. 98.
Thomae *v.* Thomae (N. J. Eq. 1889), 18 Atl. 355.
Smith *v.* Kimball, 153 Ill. 368; 38 N. E. 1029.
Dean *v.* Mumford, 102 Mich. 510; 61 N. W. 7.
Hale *v.* Hale, 125 Ill. 399; 17 N. E. 470.
Hughes *v.* Nichlas, 70 Md. 484; 17 A. 398.

A Conditional Limitation as an Executory Devise.

Brattle Sq. Church *v.* Grant, 3 Gray, 142.

Certain property was devised to the present deacons of the Church of Christ in Brattle Square in Boston and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such times as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esq., and to his heirs forever."

Bigelow, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this court, we were not called upon to give any construction to the clause in the will of

Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real estate to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs at law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which in created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle street. If the gift had been solely to the deacons of the church in Brattle street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate. Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect

of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be preserved only to the grantor or devisor, and his heirs. Upon a breach of the condition the estate of the grantee or devisee, was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the devisor, who alone had the right to take advantage of a breach. 2 Bl. Com. 156; 4 Kent. Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to note. Where an estate in fee is created on con-

dition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu;* and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference, therefore, between an estate in fee on condition and on a conditional limitation is briefly this, that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of

estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the device in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder as well as gifts and grants which, when made by will, are termed executory devises, and when contained in conveyances to uses assume the name of springing or shifting uses: 1 Preston on Estates, §§ 40, 41, 93; 5 Kent Com. (6th ed.) 128, note; 2 Fearne Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192 and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A for twenty years, remainder to B in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A until C returns from Rome, and then to B in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A and his heirs till C returns from Rome, then to B in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed

contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in the real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate. 1 Jarman on Wills, 780; 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate: 4 Kent Com. 10, note; Martin *v.* Strachan, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance; and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a *quasi* corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. In-

deed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise. 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig., tit. 38, c. 17, §§ 1, 2; Purefoy *v.* Rogers, 2 Saund. 388a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise. 4 Kent. Com. 268; 6 Cruise Dig., tit. 38, c. 17, § 2; Bac. Ab. Devise, I.; 1 Fearne Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not

made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against pepetuties. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, or recovery or otherwise. 4 Kent Com. 266; 2 Saund. 388a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rulein England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities. 4 Kent Com. 267; 1 Jarman on Wills, 221; 4 Cruise Dig., tit. 32, c. 24, § 18; Nightingale *v.* Burrell, 15 Pick. 111; see, also, Cadell *v.* Palmer, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases, on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect. Nightingale *v.* Burrell, 15 Pick. 111; 4 Kent Com. 283; 6 Cruise Dig., tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d ed.), 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of

the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendible: Bacon *v.* Proctor, Turn. & Russ. 31; Mackworth *v.* Hinxman, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: Ker *v.* Lord Dungannon, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits. Commissioners of Charitable Donations *v.* Baron-

ess De Clifford, 1 Dru. & War. 245, 253. In this case Lord Chancellor Sugden says: "This is a clear equitable devise of a fee qualified or limited; a fee in surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz.; while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterward. It can make no difference in the application of the case cited that it was the gift of an equitable fee-simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity. Lewis on Perp. 169; 4 Cruise Dig. tit. 32, c. 24, § 1; Duke of Norfolk *v.* Howard, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of Welsh *v.* Foster, 12 Mass. 97. It was there held that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two millwheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which

it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent Com. 130; Co. Lit. 206a, 206b, 223a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee; Tilbury *v.* Barbut, 3 Atk. 617; Tyte *v.* Willis, Cas. temp. Talb. 1; 1 Fearne Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute. Nottingham *v.* Jennings, 1 P. W. 25;

1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearne Cont. Rem. 467; Attorney-General *v.* Gill, 2 P. W. 369; Busby *v.* Salter, 2 Preston's Abstracts, 164; Kampf *v.* Jones, 2 Keen, 756; Ring *v.* Hardwick, 2 Beav. 352; Miller *v.* Macomb, 26 Wend. 229; Ferris *v.* Gibson, 4 Edw. Ch. 707; Tator *v.* Tator, 4 Barb. 431; Conklin *v.* Conklin, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were ingrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker. 6 Cruise Dig., tit. 38, c. 12, § 20; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless. Shep. Touch. (Preston's ed.) 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over. Egerton *v.* Earl Brownlow, 4 H. L. Cas. 1. So in the case at bar the limitation over being upon an event which is too remote, and for that

reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void;" "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases. Shep. Touch. 129, 133. See, also, 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate to John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law. 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause. 2 Pow. Dev. 102–104; Hayden *v.* Stoughton, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remain in the

donor or devisor, which would pass under a residuary clause, or in case of intestacy to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strickly speaking, a limitation. 2 Cruise Dig., tit. 16, c. 2, § 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of Austin *v.* Camebridgeport Parish, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely dif-

ferent from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of Hayden *v.* Stoughton, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of Brigham *v.* Shattuck, 10 Pick. 306, the court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may, therefore, be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds

for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

Limitation over on Death of First Devisee without Children.

Mead *v.* Maben, 131 N. Y. 255; 30 N. E. 98.

Gray, J. Upon the accounting of these executors, the question arose as to the distribution of the share in the testator's estate which was given by his will to a daughter, since deceased. It is claimed on the one hand by her administrator, and on the other by the other children of the testator. This daughter, in dying, left, her surviving, a husband but no issue. Turning to the testator's will for a determination of this question, we find, in the first three clauses, that he made certain important bequests. In the fourth clause he gave the rest of his property to his executors, to be disposed of as thereinafter provided. The fifth clause gave them a discretionary power of sale as to the realty, and directed them to make a division of the whole estate into seven equal parts. To each one of his seven children was given one of such parts, and, until the sale of the realty its income was to be paid over to them in the same proportions. Then follow clauses which are quoted in their entirety. "*Sixth.* If my said daughter Diademia shall die without leaving her will, all the share and interest remaining hereby given to her shall be equally divided among my other children. *Seventh.* If my son Jonathan shall die without having left his will, then I direct my executors, if they shall deem it proper and expedient, that they may give to any child or children of my son Jonathan the whole or any part of the share remaining herein given him; otherwise, such remaining share or interest shall be equally divided between my other children. *Eighth.* If any of my children except Diademia shall die without leaving surviving child or children or heirs of the body, then the share or portion of my estate so given to such deceased child shall go equally to my other children, but in the manner and subject to the like limitations as the specific bequests to each of them as has been hereinbefore provided and given." The seven children survived their father, who died within a few days of the execution of his will. Of his children but two were unmarried, namely, Diademia, who is 40 years old, and is referred to in the sixth clause; and Abigail, who subsequently married, and died childless. It is her husband who now claims that she took an absolute interest in her father's estate, which was not divested by her death without issue.

The justices of the general term below, upon whose concurrence in opinion a decision by the surrogate adverse to the claim of Abigail's administrator was reversed, deemed themselves bound by the rule that where a testamentary gift is simply to one or more persons, and in case of the death of any one of them without issue, to survivors, the death referred to means a death in the life-time of the testator, and the prior legatee surviving the testator takes absolutely. 2 Jarm. Wills 752. They concede that, if there was any provision which would qualify the effect of that general rule upon such language in a testamentary gift, it should be considered, and an apparent contrary intention should be sustained. But as they regarded the testamentary provisions, there was nothing to prevent the application of that general rule of construction; and hence they held that the death referred to in the eighth clause was that which should occur in the testator's life-time, and that, as Abigail survived, she took an indefeasible estate. We think the appeal should prevail and, that there are sufficient indications in this will of the testator's intending the death of his children under the eighth clause to be a death occurring at any time. The eighth clause of this will is not substitutionary merely. The scheme of the will and the context seem to indicate, strongly, a distinct purpose to prevent a sharing in the testator's estate by others than his children or their issue. In all the authorities which are referred to upon the subject of the application of the general rule above referred to, the courts — as, indeed, does Mr. Jarman, upon the authority of whom the courts have more or less relied — assume that the context of the will is silent, and that the instrument contains nothing indicating an intention which interferes with the application of this rule. Vanderzee *v.* Slingerland, 103 N. Y. 47; 8 N. E. Rep. 247. The rule must yield if, upon consulting the other provisions of a will, we can find a warrant for importing into the language used by the testator the natural and an ordinary significance. It cannot be denied that the ordinary import of the words, "if any of my children shall die," is that of a death of any of them at any time; and there are evidences in this will that not only such was the probable intention of the testator, but that to give a different construction to the language would be to thwart an apparent and a natural purpose of keeping his estate from the possession of strangers in blood.

There was effected under the directions in the fifth clause of this will an equitable conversion of the realty into personalty as of the time of testator's death. That it was intended that each child should take his or her share as of that time seems evident from the gift of the income arising intermediate the time of the

testator's death and the sale by the executor of the realty. While, however, each child took a vested interest in the seventh part of the estate upon the testator's death, subsequent clauses of the will annexed conditions to their ownership, which provided for the distribution of the shares so given, either as in the cases of Diademia and of Jonathan, should they die intestate, or as in the cases of the other children, and including Jonathan too, should they die without leaving surviving issue. It is in the consideration of these clauses that we find the circumstances which compel us to give to the testator's words in the eighth clause the broader meaning of a provision for the case of a death of a child at any time. In the sixth clause when he provides that if, "Diademia shall die without leaving her will," all her share and interest remaining "shall be equally divided among my other children," he obviously contemplates her death after him. Her right to will, and the direction to divide the "share or interest remaining," sufficiently indicate that understanding. So, when, in the seventh clause, he provides that, if "Jonathan shall die without having left his will," the executors have the discretionary power to give "the whole or any part of the share remaining" to any of his children, or, "otherwise," are to divide "such remaining share" equally among testator's other children, it is a clear indication of a testamentary purpose to be effectuated in the case of Jonathan's death intestate after the testator. When, then, in the eighth clause, we find the provision that "if any of my children except Diademia shall die" without issue, "the share so given to such deceased child shall go equally to my other children," the testator must be deemed to have used the words "shall die" in the same association of ideas as he had just previously used them, namely, of the child's death after him, and while in possession of his or her share, and with the intention of providing for the event of a child dying without leaving children to take the share. This idea is enforced by the exception of Diademia from the operation of the testamentary direction in this clause. In her case, a woman forty years of age and unmarried, she was given the right to dispose by will of her share, — a right and favor greater than were conferred upon the other children, for even Jonathan was not excepted in the eighth clause. In the seventh clause, which related to him, his right to will the share was only in the event of his leaving issue. The eighth clause placed him in the same category with the children, other than Diademia, in the event of his leaving no issue him surviving. The words "shall die," in this eighth clause, should be read, not only in connection with an association of ideas dominant at the time, by natural sequence, in the

testator's mind, but as well in the light of an evident and contemplated purpose to prevent at any time, by reason of the death of a child before as well as after testator, the passing of his property into any hands, save into those of a child or descendants, except in the one peculiar case of the daughter Diademia, who was permitted to will away the share which came to her, and whose marriage and possibility of issue were not considered. That this eighth clause covers the case of a death either before or after the testator's seems plain, too, because it makes the gift over, if a child shall die without issue, "in the manner and subject to the like limitations as the specific bequests to each of them has been hereinbefore provided and given." The expression may perhaps not be very happy; but, nevertheless, of necessity it must have a reference to a disposition by the testator, upon or at the time of his death, as to the nature of the interest which should vest in each child, and be held by him or her after his death, and until he or she shall die.

We agree with the learned justice who dissented at the general term in thinking that in this case the intention of the testator is better carried into effect by following the literal meaning of the language of his eighth clause than artificial rules of construction. Where the testator's intention is concealed, and context is silent, and circumstances are wanting to aid us, the application of such a general rule is proper enough and safe; but where the courts can make out the testator's probable intention, and it can be carried into effect without violating any rule of law or statute, no general rule may rise above it. The judgment of the general term should be reversed, and the decree of the surrogate should be affirmed, with costs. All concur, except Maynard, J., absent.

Reversion of Estate Undisposed of by Executory Devise.

Thomae *v.* Thomae (N. J. Eq. 1889), 18 Atl. Rep. 355.

BIRD, V. C. The testatrix gave to her husband and uncle, as executors and as trustees, "all my real and personal estate, to be held by them in trust for the benefit of my children; and I direct that the income arising from the same shall be under the control of my said husband, for the maintenance of my children. In case of the death of both of my children during the life-time of my husband, I direct that the income shall be paid to my husband during his natural life." One of the executors and trustees refused to qualify, and the other has since been discharged. The complainant, as administrator *de bonis non* is doubtful what

interest the children of the testatrix take under the said will. This gift is of the principal in trust, for the benefit of the children of the testatrix, the income thereof to be paid to them without any qualification or limitation, except in case of the death of the children of the testatrix in the life-time of the husband, and then the limitation is expressly limited to his life-time. In such event he has an interest so long as he shall thereafter live. There is no disposition made of the principal or income. This, then, being an absolute gift of principal to be held in trust for the children of the testatrix, and also a distinct direction that the income shall be paid to them, it is, in my judgment, an absolute gift of the principal for the benefit of the children, subject only to the gift of the income in the husband, in case he shall survive the children, during the remainder of his life-time. At his death the estate will descend to those who will be entitled to any other estate of which the said children may die seised. To accomplish this result, it was not necessary that the gift should be to the heirs of the said children. Then, besides the gift of the principal thus made so absolute, the general rule that the gift of the income of a fund, or of the rents and profits, without limitation, carries the *corpus*, is applicable in this case. House *v.* Ewen, 37 N. J. Eq. 368, 373; Gulick *v.* Gulick, 25 N. J. Eq. 324; Huston *v.* Read, 32 N. J. Eq. 591; Craft *v.* Spook, 13 N. J. Eq. 121. And as to income from real estate, Jones *v.* Stites, 19 N. J. Eq. 324; 3 Greenl. Cruise. 229; O'Hara Wills, 61; Hardy *v.* Redman, 3 Cranch C. C. 635.

Limitation of an Executory Devise on Failure of Issue — Heirs Construed to Mean Issue.

Smith *v.* Kimball, 153 Ill. 368; 38 N. E. 1029.

Magruder J. This is a bill for the specific performance of a contract for the sale of real estate, filed by appellant against appellee. The bill was answered, and, after hearing had, the circuit court found the equities with the defendant, and dismissed the bill. The present appeal is prosecuted from such decree of dismissal. By the terms of the contract, appellee agreed to purchase lot 3, hereinafter mentioned, of appellant, for $9,000, payable, $100 in cash, and "the balance in twenty days after receiving an abstract showing good title" in appellant. The abstract of the title was furnished within the 20 days, and appellee refused to carry out the purchase, upon the ground that the abstract did not show a good fee-simple title in appellant. Appellant holds by deed from Frederick Mohlenpaugh, who received a conveyance from

Sarah Jane Dustan. Sarah Jane Dustan, whose maiden name was Sarah Jane Spears, derived her title through the will of her mother, Abigail Spears. There is no question that Abigail Spears had good title, and that appellant owns whatever title was obtained by Sarah Jane Spears (afterwards Dustan) under said will. The question in dispute arises upon the construction of the will of Abigail Spears, which was executed on January 28, 1854, and, after providing for the payment of funeral expenses, is as follows: "Second. My just debts are to be paid, and I appoint Alexander Tulloe, of Joliet, my executor. I also will and direct that forty acres of land lying in Will County, State of Illinois, shall be sold, and, after discharging the above expenses, the balance shall become and be the property of my daughter, Sarah Jane Spears. I also direct that lot No. 3, in block No. 21, in Joliet, Illinois, with its appurtenances, as deeded to me by David Richards and wife, and also all my interest in the lot of land now occupied by David Wooley, of La Porte County, State of Indiana, also my interest in the estate of my grandfather, Francis Lucas, all be and become the property of my daughter, Sarah Jane Spears; and, should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above-described property shall be equally divided between my sisters, to wit, Olinda Wooley, Deborah Wooley, Sarah Jane Wooley, Elizabeth Johnson; and it is my wish that my sisters, Deborah and Sarah, shall have the care and charge of my daughter, Sarah Jane Spears." Abigail Spears died on February 4, 1854, and left, her surviving, her daughter, the said Sarah Jane Spears, who afterwards married a man named Dustan, and has children living. The will was admitted to probate on February 11, 1854.

What title did Sarah Jane Spears take to the above described lot 3 under the will of her mother? The testatrix directs that said lot 3, and all her interest in the lot occupied by David Wooley, also her interest in her grandfather's estate, "shall be and become the property of my daughter, Sarah Jane Spears." No words of inheritance, such as "and her heirs," are here used. This language would, at common law, only have given a life estate in the land. But section 13 of the conveyance act provided that "every estate in land which shall be granted, conveyed or devised, although the words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Therefore the clause directing that lot 3 "shall be and

become the property of my daughter," standing alone, and without being qualified in any way by the language following it, vests in the daughter a fee transmissible to her heirs, notwithstanding the omission of the word "heirs." Baker *v.* Scott, 62 Ill. 86; Walker *v.* Pritchard, 121 Ill. 221; 12 N. E. 336; Wolfer *v.* Hemmer, 144 Ill. 554; 33 N. E. 751. Is a less estate limited by the words that follow, and, if so, what estate? Those words are "and, should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above described property shall be equally divided between my sisters"

In view of the construction thus placed upon the first clause, as being a clause which, standing alone, vests a fee in the devisee, it is manifest that this is a case where the fee in the first instance is conveyed to the first taker; but an effort is made to transfer this fee, upon the happening of a specified contingency, from the first taker to others, by way of executory devise. In other words an attempt is made to mount a fee upon a fee, and this can only be done by executory devise. "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyance at law." 4 Kent. Comm., marg., p. 264. It is one of the rules governing contingent remainders that an estate cannot be limited over to another after a fee already granted. A remainder implies something left, and there can be nothing left after the whole has been once disposed of. It is for this reason that a fee already granted cannot be defeated and transferred to another by way of remainder. Hence the devise over, "should the said Sarah Jane Spears die leaving no heirs," can only be sustained, if at all, as an executory devise, and not as a contingent remainder. To prevent perpetuities in executory devises it is an established rule that, in case of such a devise, the contingency upon which the intended limitation is to take effect shall not be postponed longer than a life or lives in being and 21 years and a fraction of another year thereafter. If the contingency is not fixed within that period, the executory devise is bad, and the limitation is void for remoteness; but, if it is so fixed, the devise is good, and the limitation is valid. In the present case the determination of the question whether the contingency upon which the limitation is to take effect is too remote, and by consequence, whether the limitation itself is void or not depends upon the construction to be given to the words "and should the said Sarah Jane Spears die leaving no heirs." The limitation to the sisters of the testatrix is dependent upon the event that the daughter should die "leaving no heirs." Do these words import a definite or indefinite failure of issue? A definite failure of issue is where

a precise time is fixed by the will for the failure of issue; as in the case of a devise to A., but, if he dies without issue living at the time of his death, then to another. An indefinite failure of issue means a failure of issue whenever it may happen, without fixing any time, or a certain and definite period within which it must happen. 4 Kent Comm., marg. p. 274; 1 Bouv. Law Dict., p. 642. An executory devise which is to take effect upon an indefinite failure of issue is void for remoteness. 4 Kent Comm., marg. p. 274. The words "dying without issue," or "die without issue," when standing alone, are held by the great weight of authority in England and in this country to denote an indefinite failure of issue, and a limitation upon such terms, unqualified, is regarded as void for remoteness. 2 Washb. Real Prop., marg. pp. 360, 361. But the courts often avail themselves of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time, and not an indefinite failure. *Id.*, marg. p. 362. "Slight circumstances are laid hold of as sufficient to indicate an intention that a limitation over on death without issue shall take effect at a definite time, to wit, on the death of the first taker." 2 Redf. Wills (3d Ed.), marg. p. 277, and note 51; Bedford's Appeal, 40 Pa. St. 18. The words "die without leaving issue surviving," or "leaving no issue or child," or "if he should leave no children," have been held to create a definite failure of issue. Nicholson *v.* Bettle, 57 Pa. St. 386; Hill *v.* Hill, 74 Pa. St. 173; Clapp *v.* Fogelman, 1 Dev. & B. Eq. 466; Wight *v.* Baury, 7 Cush. 105; Van Dyke *v.* Vanderpool, 14 N. J. Eq. 198; Fairchild *v.* Crane, 13 N. J. Eq. 105; Hull *v.* Eddy, 14 N. J. Law, 169; Eaton *v.* Straw, 18 N. H. 320; Hall *v.* Chaffee, 14 N. H. 215; Goodell *v.* Hibbard, 32 Mich. 47; Grier *v.* Griswold, 18 Ga. 550; Flinn *v.* Davis, 18 Ala. 132; Smith *v.* Harris, 16 Ga. 545.

In the case at bar the words are "die leaving no heirs." The word "heirs" may sometimes be construed to mean "children" or "issue" according to the context. Loveday *v.* Hopkins, 1 Amb. 273; Smith *v.* Harris, *supra;* Goodell *v.* Hibbard, *supra;* Griswold *v.* Hicks, 132 Ill. 494; 24 N. E. 63; Summers *v.* Smith, 127 Ill. 645; 21 N. E. 191. In the will now under consideration the word evidently means "children" because if the intention was to include heirs generally, the sisters of the testator, who were to take upon the happening of the contingency, being the aunts of the daughter, might be included among her heirs. It could hardly have been the intention of the testator that her sisters should take in the event of her daughter dying without leaving these same sisters as her heirs. But, while the

word "heirs" is here evidently intended to mean "children," it unquestionably refers to children as the heirs of the devisee. The word "heirs" is ordinarily used in wills to designate those persons who answer this description at the death of the testator. The word "heir," in its strict and technical import, applies to the person or persons appointed to succeed to the estate in case of intestacy. Kellett *v.* Shepard, 139 Ill. 433; 28 N. E. 751, and 34 N. E. 254. Those who succeed to the estate are those who are understood to be living at the time of the intestate's death. If this view be correct, the words "should the said Sarah Jane Spears die leaving no heirs," mean "should the said Sarah Jane Spears die leaving no children at the time of her death." This construction receives support from the fact that the persons who are to take in the event of the death of the daughter leaving no heirs were in existence at the time of the making of the will, and are mentioned by name. Mention of the sisters as being then alive, and the designation of two of them to take the care and the charge of the daughter, are facts which do not consist with the idea that those sisters were to take the estate if, at any time in the future, no matter how remote, the heirs of Sarah Jane Spears should become extinct. Parish *v.* Ferris, 6 Ohio St. 563; Niles *v.* Gray, 12 Ohio St. 320; Armstrong *v.* Armstrong, 14 B. Mon. 333; Daniel *v.* Thompson, *Id.* 663; Bullock *v.* Seymour, 33 Conn. 289; Hudson *v.* Wadsworth, 8 Conn. 348.

In the recent case of Summers *v.* Smith, 127 Ill. 645; 21 N. E. 191, the language of the will was: "It is further my will, in case any of my sons," etc., "should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brother or brothers." It was held that, where the devise over is to the survivor or survivors of a class to which the first devisee belonged, it means a devise to a person in being at the death of the first devisee, and so relieves the devise over of objection on account of remoteness; and it was there said: "In the absence of anything appearing to the contrary, language must be presumed to have been intended to have the legal effect which the law assigns to it. So, therefore, here, 'dying without heirs of body' could only mean dying without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first devisee, as children," etc. The rule, as announced by the English cases, is that a devise in fee, with a remainder over if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote and founded on an indefinite failure of issue. 4 Kent

Comm., marg. p. 276. But section 6 of the Illinois conveyance act provides that "in cases where, by the common law, any person or persons might hereafter become seized, in fee tail of any lands, tenements or hereditaments, by virtue of any devise, gift, grant, or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance." 1 Starr & C. Ann. St., p. 571. Hence the same reasons for holding that the words "die leaving no heirs" refer to issue indefinitely or a failure of issue at any time, rather than to a failure of issue at the death, do not exist in this State, where we have no estates tail, as exist where, as at common law, estates tail are recognized. Summers *v.* Smith, *supra*. In Voris *v.* Sloan, 68 Ill. 588, the words "in case she should die without issue" occurring in a deed of trust, were construed to mean, "without having had issue;" so that, upon the birth of a child or children of the body, the contingency was fulfilled, and the fee vested in them, and the limitation over was defeated. But the plain and obvious meaning of the expression "should the said Sarah Jane Spears die leaving no heirs" or children is that she should die leaving no heirs or children at the time of her death. This construction accords with the grammatical relation of the words in the phrase, and with the common understanding of their import. Williams *v.* Lewis, 100 N. C. 142; 5 S. E. 435; Hall *v.* Chaffee, 14 N. H. 215.

The necessary result of this construction by which the words in question are held to import a definite, and not an indefinite, failure in issue, is that the devise to Sarah Jane Spears must be regarded as the devise of a fee determinable upon her dying without leaving children at the time of her death. Summers *v.* Smith, *supra*. It cannot be known until the death of Mrs. Dustan whether the contingency will happen by which the limitation over is to take effect. If she dies leaving no children at the time of her death, her mother's sisters will take the property; but, if she leaves a child or children at that time, such child or children will take the property as her heirs. It follows that appellant did not have such a fee-simple title as was called for by the contract, and the decree of the court below was right.

It is most strenuously contended by counsel for appellant that

the words "die leaving no heirs" refer to the death of the devisee in the lifetime of the testatrix, and that, as she survived the testatrix, the fee simple vested in her. Several cases in New York and Pennsylvania are referred to which seem to sustain this view. But they are not applicable here, for the reasons involved in the observations already made. "When the death of the first taker is coupled with other circumstances, which may or may not ever take place — as, for instance, death under age or without children — the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, "upon death" under the circumstances indicated, at any time, whether before or after the death of the testator. Britton *v.* Thornton, 112 U. S. 526; 5 Sup. Ct. 591; Buchanan *v.* Buchanan, 90 N. C. 308; 5 S. E. 430; Summers *v.* Smith, *supra;* 11 Am. & Eng. Enc. Law, p. 919. The language of the provisions in the will sustains the view that the death of the devisee in the lifetime of the testatrix was not intended. The testatrix wills and directs that forty acres of land be sold, "and after discharging the above expenses," the balance shall become and be the property of my daughter. The "above expenses" included funeral expenses, which, of course, could not be incurred until after the death of the testatrix. The last clause directs that "all of the above-described property shall be equally divided between my sisters" should the daughter die leaving no heirs. "All of the above-described property" includes the balance of the proceeds of the sale of the forty acres after paying funeral and other expenses, which balance could not exist until after the death of the testatrix; and, as the distribution to the sisters could not take place until after the death of the daughter, the death of the daughter must have been contemplated as occurring after that of the testatrix. We think, however, that the court below should have dismissed the bill without prejudice, so as to leave appellant to his remedy at law. The decree of the circuit court will accordingly be reversed, and the cause is remanded to that court, with directions to dismiss the bill without prejudice. Reversed and remanded, with directions.

Rule of Perpetuity.

Dean *v.* Mumford, 102 Mich. 510; 61 N. W. 7.

MONTGOMERY, J. Complainant, as one of the legatees named in the will of Horace M. Dean, filed this bill against the defendants Mumford and Frank Dean, executors, and the codefendants

as legatees, asking a construction of the terms of the will, if held valid, and asserting that it is as a whole invalid, in equity. A preliminary question is raised as to the jurisdiction, it being claimed by defendants that, except at the suit of a trustee or *cestui que trust* who asks a direction as to the execution of a trust, a court of chancery has no jurisdiction to construe a will or declare any or all of its provisions invalid. But, however this may be, the executors have answered, in this case, and in terms submitted the question of construction of the will to the court. As it is undoubted that they might have invoked the jurisdiction of the court for that purpose by a bill, we think that, they having submitted the question, the court may properly maintain jurisdiction. Sawtelle *v.* Ripley (Wis.), 55 N. W. 156.

The material parts of the will are as follows: "First. I give and bequeath to my beloved wife, Mary C. Dean, the use of the homestead now occupied by us, No. 83 State street, together with all the furniture and other personal property thereon and connected therewith, to be used and enjoyed by her during her natural life as a home for herself, and for such of my children as shall remain unmarried, and shall be agreeable to her. The taxes and repairs upon said homestead to be paid by my executors from my estate. Second. I also give and bequeath to my said wife the sum of fifteen hundred dollars per annum, to be paid to her quarterly or monthly by my executors, as she may desire, to be received, used, and enjoyed by her during her natural life. Third. All the rest, residue, and remainder of all the goods, chattels, real and personal estate of whatsoever kind or nature, or wheresoever the same may be situated, I desire to be divided equally between my five children, — Edgar S., aged 38; Arch. H., aged 30; Herbert L., aged 28; Frank, aged 26; and Lizzie, aged 23, — or to the survivors of them, excepting in case any of them shall die leaving child or children surviving. Then, in such case, the respective interests of my sons and daughters above named shall go to and belong to the child or children surviving them, respectively. Fourth. Whereas I have advanced to my sons Edgar S. and Arch. H. certain sums of money, which will appear charged to them upon my books, and if I should advance to them or either of them, or others of my children, during my lifetime, other sums, all such sums in money or property which I shall advance to or pay for and shall charge to them, respectively, shall be deducted from the respective portions above designated to go to my said children. Fifth. I hereby will and direct that the portions hereinbefore designated for my said sons Edgar S., Arch. H., and Herbert L., be held in trust by my executors, as trustees for my

said sons, their wives and children, and the interest, income, and profit thereof be used and paid as in the judgment of my said executors shall be best for the support and maintenance of my said three sons, their wives and children, during the lives of my said sons and their wives; and upon the decease of my said sons and their wives the portion so held in trust by my said executors shall become the property of and go to the child or children of said sons, severally, and their heirs and assigns forever."

It is the contention of complainants — First, that the first and second clauses make the taxes and repairs and annuity a charge upon the estate, and create a trust in favor of the widow which continues during her life; and, second, that, if this be not so held, then under any construction which may be given to the fifth clause, the power of alienation is suspended for a longer period than during two lives in being, and that for this reason the trust created in the fifth clause falls.

The defendants contended — First, that inasmuch as the widow has elected to take under the statute, and not under the will, the validity or nonvalidity of the will should be determined without reference to the intended provision for her; second, it is contended that the power of alienation was not, by the terms of the will, suspended, during the life of the widow; and, third, that by the proper construction of the fifth clause, in connection with the third and fourth clauses, of the will, the power of alienation is not suspended, as to any portion of the estate which vested after the death of the widow, for a longer period than two lives in being.

We think, if the power of alienation was not suspended during the life of the widow, the case presents no very serious difficulty. It appears to be conceded by counsel who seek to maintain the validity of the will and its provisions that the fifth clause restrains alienation for the period of two lives in being. The construction of the will for which they contend is that, under the provisions of the third clause, the estate is to be divided into five equal shares, that two of the shares — those devised to Frank and Lizzie — vest at once; that, by the terms of the fourth clause, certain advancements are to be taken out of the shares of Edgar S. and Arch. H., and the remainder is, in each instance, as in the case of the one-fifth instance of Herbert L., to be held in trust by the executors for the respective legatees named their wives and children; and that upon the decease of Edgar S., and his wife Eliza, the one-fifth less the deducted advancements, becomes the property of their children; and so in the case of Arch. H. and Herbert L. We think this contention is sound, so far as it relates to the third and fifth clauses, if it

be held that there was no restraint or alienation during the life of the widow. It was very plainly the purpose of the testator to divide his estate into five equal parts, and we think it very clear that it was not the intention to provide by the fifth clause that the three parts which had been set apart by the third clause of the will to Edgar S., Arch. H., and Herbert L. should be held in trust for the common use of the sons, their wives and children. But it is suggested that, in this view, as Herbert L. was unmarried at the time the will took effect, the will should be construed to relate to any wife whom he might in the future marry; and, so construed, it would not vest in the children or heirs until after the expiration of two lives in being. We think the will not open to this construction, but that it was intended to mean any wife of Herbert L. living at the time of the decease of the testator. Van Brunt *v.* Van Brunt, 111 N. Y. 178, 19 N. E. 60. The will should not be given a construction for the purpose of defeating the intention of the testator, which would bring within its purview one who should in the future become the wife of one of the legatees.

The important question, then, as it appears to be conceded, is whether the power of alienation was suspended during the life of the widow. If the contention of defendants' counsel, that the election of the widow to take under the statute calls for a construction of the will as it would have read without any attempt to make provision for her, be allowed, this, with what we have above determined, would be an end of the case. A statement is found in the case of Bailey *v.* Bailey, 97 N. Y. 470, sustaining the contention of defendant's counsel. But in that case it had been determined in the opinion that the bequest of the widow was of a life estate in the property, which she had the right to sell if she chose; so that the statement affirming the doctrine here contended for was *dictum*. We cannot accept this as a correct statement of law. The will must, it seems to us, be construed as made. It will not do to say that provisions which are incorporated in a will, and which are not valid when made and when the will takes effect, can thereafter be made valid by the election of the widow. This would, in effect, empower the widow to execute a will by validating what was previously no will. Counsel also cite, as sustaining this contention, In re Woodburn's Estate (Pa. Sup.), 25 Atl. 145; Small *v.* Marburg (Md.), *Id.* 920; and Tracy *v.* Murry, 44 Mich. 109; 6 N. W. 224. In the cases of In re Woodburn's Estate and Small *v.* Marburg the question before the court related to the effect of the election of the widow to take under the statute upon the distribution to be made of the

estate. Neither case deals with the question of whether the widow can, by declining to take under the will, make that valid which was before invalid, nor was any such question before the court. In Tracy *v.* Murray the widow renounced her right to take under the statute, and elected to take under the will. The court say: "Accepting as correct the doctrine of those cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provisions of the will after her husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation, if not paid, would simply become a claim against the estate, and take its place, when proven against the estate, with the other allowed claims. The husband during his lifetime, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seised, makes an offer therefor which is not to be submitted to her for acceptance until after his decease." This case, it will be seen, presented no question of validating invalid provisions of the will, but dealt with the rights of the widow as they existed under the will as made by the deceased; and the case certainly contains no intimation which sustains the contention here made.

Were these taxes and annuity a charge upon the estate in such a sense as to create a trust, and suspend the power of alienation? It is settled that no express words creating a trust are requisite, if the intent to devote the estate to a particular purpose is apparent from the terms of the will. Where a duty is imposed upon the executor which makes it necessary for him to retain the possession, continually, of realty, he will take an interest adequate to enable him to perform this duty; and an alienation which cuts off that right is, by implication, prohibited. Perry Trusts, §§ 121, 213, and cases cited; Cummings *v.* Corey, 58 Mich. 494; 25 N. W. 481; Vail *v.* Vail, 7 Barb. 226. And where there is a provision in the will that certain debts and charges are to be paid, and the residue of the estate not thus expended is then divided, the particular debts, legacies, and charges will be considered a charge against the estate, real and personal. See a discussion of this rule in 2 Jarm. Wills, p. *1411 *et seq.*; Greville *v.* Browne, 7 H. L. Cas. 689; Gainsford *v.* Dunn, L. R. 17 Eq. 405; Lafferty *v.* Bank, 76 Mich. 35; 43 N. W. 34. It will be noticed in the present case that the will, after bequeathing the homestead, makes the taxes and repairs upon the homestead payable from the estate of the testator. It also provides for an annuity of $1,500 per annum, to be paid by the executors during the natural life of the widow, and then be-

queaths all the rest, residue, and remainder of all the goods, chattels, real and personal estate, to the five children named. We think the intention is clearly manifested to make the entire estate, real and personal, subject to these charges, and the executors may devote the income of the estate, both real and personal, to that purpose, and are required to do so if necessity therefor exists. This attempted restraint on alienation must be held void.

The question is raised as to whether the will is void in toto. We think not. Certain duties are imposed upon the executors which might, notwithstanding the failure of the limitation in the fifth clause, be performed, and the provisions charging against the shares of Edgar S. and Arch. H. the amount of certain advancements should be sustained. As the widow has elected to take under the statute, it is not material to determine whether, upon the failure of the limitation in the fifth clause, the children would take an absolute fee under the third clause, as their interest would be the same whether they take as heirs at law or by the terms of the will. A decree will be entered in accordance with these views. The costs will be paid out of the estate. The other justices concurred.

Rule of Perpetuity — Accumulations of Profits.

Hale *v.* Hale, 125 Ill. 399; 17 N. E. 470; see Hale *v.* Hale, 146 Ill. 227.

Scott, J. The bill in this case is for partition of the real estate of which Ezekiel J. M. Hale died seised, and which is situated in the county of Cook, in this State, and was brought by one of the heirs in the superior court against the widow, the executors, and the other heirs of decedent. Concerning the facts out of which the litigation arises no controversy exists. Prior to his death the common ancestor of the heirs claiming his estate in Cook County as intestate property, resided at Haverhill, in the State of Massachusetts. At the time of his death he owned a large estate in Massachusetts, consisting of both real and personal property, all of which it is conceded was disposed of by his will, which was, after his death, admitted to probate in that State, and which is conceded by all parties interested to be valid under the laws of Massachusetts. The testator also left a large amount of property situated in the State of New York, and the property involved in this litigation in Illinois. The larger portion of the estate seems to have been in Massachusetts, where the testator had resided and where his will was admitted to probate. It seems the testator gave various legacies and de-

vises, and provided in different clauses of his will for life annuities, to a number of persons — perhaps 12 in all — and for other annuities, payable at stated periods, until the final division of the residue of his property under the provisions of his will. It is understood, and perhaps admitted, that there is sufficient estate in Massachusetts out of which to pay all legacies, devises, and annuities provided for or declared in the will. It is not claimed that any of the property belonging to the estate situated either in New York or this State will be wanted for the payment of either legacies, devises, or annuities under the will. The bill in this case alleges the will of Ezekiel J. M. Hale, deceased, was admitted to probate in Massachusetts, where he died, no one objecting; which is an admission it was valid, and disposed of all the property belonging to the estate in that State. But the bill is framed on the theory it was not the intention of the testator to devise the real estate now sought to be partitioned; that the scheme of his will was not adapted to the condition of his estate in New York and in Illinois, and was not intended to convey the same; that by the laws of Illinois and New York the devise was void, and had been so declared by the courts of the latter State; that such testator well knew that the provisions of his will, if applied to his real estate in New York and Illinois, made the same illegal and void on account of the statutes of such States prohibiting perpetuities; that if the provisions of the will should be applied to the land in Illinois or New York, the same could not be alienated for many years, and not until after the death of 12 life annuitants; that the property in Illinois is unproductive, and cannot be made productive; that the taxation upon it is large, and that the interest and taxation will entirely absorb the value of said real estate, so as to render it a total loss to the heirs, if it should be held to be included within the terms of the will, and hence not subject to division except in accordance with the will. It is alleged the property situated in New York belonging to the estate exceeds in value $1,000,000, and that in Illinois is now estimated to be of the value of $200,000. The executors answered the bill as they were required to do, in which they admitted most, if not all, of the formal charges in the bill, but insisted the lands sought to be partitioned passed to them under the residuary clause of the will of the testator; and on filing their answer, they filed a cross-bill, in which they claimed to have the power under the will to sell such real estate, and asked the court to so decree. The respondents in their cross-bill make the same allegation as is contained in the original bill; that, unless the property described in the bill can be sold,

it will be absorbed by taxes and assessments and other expenses before the time for distribution would arrive under the provisions of the will. The superior court, at the hearing of the cause, dismissed the cross-bill of respondents, and found that the property described in the original bill was intestate property, and decreed a partition of the same, as it was asked to do. That decision is assigned for error.

The residuary clause of the will out of which all the questions made on this record arise is as follows: "*Twenty-second.* As to the residue and remainder of all my estate, both real and personal not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will; and that then the said residue and remainder, with all the accumulated interest thereof, shall be divided equally among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns, forever." Most of the other clauses of the will contain provisions for legacies, bequests, devises, and annuities to certain persons, and others contain specific directions as to what disposition shall be made of certain property; and beyond giving an outline of the general scope of the will, and the intention of the testator as to the management of his estate by the executors and trustees, they contain nothing that is important in connection with the present discussion, and their contents need not be stated other than in a general way.

Two principal questions are made by the original and cross bills: (1) Whether the lands involved were devised by this clause of the will, or whether the same can be treated as intestate property, as not being embraced in the will; and, (2) if it shall be held the lands were devised, is any power given the executors and trustees, either expressly or by implication, by this or any other clause of the will, to sell these lands at any time within their discretion? It will be found most convenient to consider these questions in the inverse order in which they are stated, which will be done briefly.

There is and can be no pretense that any express power is given to the executors and trustees to sell any real estate situated in New York or in Illinois that had belonged to the testator by the twenty-second clause, or any other clause, of his will; and if any such power exists in them it must arise by implication from powers conferred or duties expressly imposed by the will in regard to such real estate. Power is expressly conferred upon the executors and trustees to sell certain real property, as in the

second clause of the will, but nothing is said anywhere in the will concerning the sale of the real property in New York or Illinois. It is not even mentioned by any description, by location or otherwise. If it is devised at all, it is by the twenty-second or residuary clause of the will, and not otherwise. But does the twenty-second paragraph of the will confer any power upon the executors and trustees to sell real estate situated in New York or Illinois, even by implication? It is thought it does not. There can be no doubt of the correctness of the rule stated by counsel that authority to sell and convey trust property may be conferred by implication; as for instance, where duties are imposed by the instrument creating the trust upon the trustee, which he cannot perform without making a sale, the law will imply the necessary power; otherwise there would be a failure of the objects of the trust. A most common example is where there has been an assignment for the payment of debts, if no express power is given to sell the trust property, the duties to be performed by the trustee will necessarily create the power of sale, for it is obvious in no other way could the trustee perform the duties required of him by the instrument creating the trust. The law will not permit a trust to fail because it may be inartificially declared or expressed. This is undoubtedly as liberal a statement of the implied powers of trustees as the law will sanction. Applying this rule, neither the twenty-second clause, nor indeed any other provision, contains anything that indicates, by implication or otherwise, it was the intention of the testator that his executors and trustees should have power to sell and convey any of his real property, either in New York or Illinois, for the purpose of converting it into personalty. The words supposed to manifest the intention of the testator in this regard are "that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in the foregoing will." It is said the words "well and safely" mean that the testator gives the executors and trustees the usual authority to make prudent investments, and that they mean they must keep the property invested. The vice of the argument on this branch of the case lies in detaching these words from their place in the will, and giving to them a meaning inconsistent with the context. What is the direction given by the testator concerning this property in New York and Illinois? It is that it "remain in the care and control" of the executors and trustees, "well and safely invested." That is, it is to "remain," as now, "well and safely invested." Any other would be a

strained and unnatural construction of the words of the will. So far from indicating any intention on the part of the testator that his executors and trustees should sell his lands either in New York or Illinois, the words used indicate unmistakably it was his intention and purpose they should "remain" in the care and control of his executors and trustees, "well and safely invested," as they then were, until the time appointed for the distribution of the residue of his estate, both real and personal, should arrive. The principle running through all the cases on this subject, so far as the writer has been able to examine the same, is, the provisions of the will must be so clearly written as to leave no doubt of the intention of the testator to have his real estate converted into personal estate, to sustain the doctrine of what is called equitable conversion. That intent does not appear from any language used by the testator in this case, and it is not perceived his trustees have any implied power to change the real property devised into personal estate for reinvestment or otherwise. This precise question was presented to the Court of Appeals of the State of New York by the same parties to this litigation; and in an action brought by these executors and trustees to obtain a construction of certain provisions of the last will and testament of Ezekiel J. M. Hale, deceased, that court held, after most elaborate argument, the will, while valid under the laws of Massachusetts, where the testator died and where his will was admitted to probate, contained no express direction for the conversion of the real estate into personalty, or for the sale of the real estate. Hobson *v.* Hale, 95 N. Y. 588. This court is entirely satisfied with the conclusion reached by the court of appeals in that case, and the elaborate discussion there given to the exact question involved in the case now being considered would seem to relieve this court from the necessity of any extended consideration of the question. Under this view of the meaning of the will, the relief demanded by the cross-bill, that the right of complainants in that bill to sell and convey the lands involved and to convert the same into money may be established and declared, was properly denied.

The remaining question arises on the original bill, and is whether the land situated in Illinois, and which belonged to the estate of the testator, were devised by the residuary clause of the will, or whether the same can be treated as intestate property, as not being embraced in the will. There is evidence tending to show what the court found by its decree, that the testator bought these lands in Cook County for speculation, and that had he lived it is probable he would have sold the same on receiving the first favorable offer. That he gave expression to such views

is proved past all doubt, but whether he changed his mind in that regard before his death of course cannot be known. Construing the will in the light of the surrounding circumstances, as the law requires shall be done, does it show the testator intended to omit these lands from the operation of his will? It is seen the residuary clause of the will is as broad and comprehensive as it can well be expressed. It is, "As to the residue of all my estate, both real and personal, not herein otherwise disposed of." Primarily the words "all of my estate" mean all the estate of the testator, wherever situated, and that meaning will always be given to them unless something in the context will show a more restricted construction that will better comport with the clear intention of the testator. It will be noticed the real estate of the testator situated in New York, if devised at all, was devised by this same clause of the will. There is no other clause of the will that can have the slightest application to it. If the lands in Illinois shall be held not to have been devised by the twenty-second clause of the will, the conclusion would necessarily be the New York lands were not within its operation. No one has ventured to suggest the testator did not intend by this clause of his will to devise his property in New York. When the case was before the court of appeals of New York, that court seems to have held, without much discussion, the property in that State was devised by the will; for it was said: "While it should not be overlooked that the testator was domiciled in the State of Massachusetts, and his will was executed there, it should also be borne in mind that by his will he devised his real estate, as real estate, situated in the State of New York." Any other conclusion would be too improbable to be adopted. The same words in the will that are held to constitute a devise of lands in New York include also the lands in Illinois. Either the lands in both States are devised, or they must be treated as interstate property in both States. It is incredible that a testator making a will that by its terms, when understood in their primary sense, disposes of all "his estate, both real and personal" omitted therefrom property conceded to be of the value of over $1,200,000. Such a proposition is too improbable to be adopted, unless the testator was incapable of comprehending what he was doing. Plainly the residuary clause of the will is broad enough to include all the property of the testator, no matter where situated, and there is nothing in either of the attendant circumstances, or in any other clause of the will, that shows any intention on the part of the testator to omit any property in Illinois or elsewhere from its operation. When this case was before the court of appeals of New York it was held that the clause of the twenty-second

paragraph of the will that postponed the final division of the estate until the death of the last survivor of the life annuitants, so far as it applied to real estate in that State, worked an unlawful suppression of the powers of alienation, and was for that reason void, and it was also held such clause was repugnant to the provisions of the statute of that State prohibiting accumulations except for the times and purposes therein permitted. No such objection lies to that provision of the will in this State. A perpetuity in this State is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years beyond. Here the right of alienation is not suspended for any period beyond the lives of certain persons in being, and hence this provision of the will is not repugnant to any rule of law in this State inhibiting perpetuities. But it is said a construction that would postpone the alienation of this property for more than fifty years is opposed to public policy. The limitation fixed is to terminate at the death of certain life annuitants, and of course when that contingency will happen is a matter of the merest conjecture. It might occur within 5, 10, 20, 40, or 60 years. Of course the time is indefinite, and all that can be known concerning it with any degree of certitude is that it is sure to happen sooner or later. The time for which the executors and trustees are to hold the residue of the estate, for which there might be a suspension of the right of alienation of the property in contraversy, is limited to the death of the last survivor of the life annuitants, and it is not perceived that in that respect it contravenes any public policy existing in this State. The decree of the superior court dismissing the cross-bill will be affirmed, and the decree granting the relief demanded on the original bill will be reversed, and the cause will be remanded, with direction to that court to dismiss the original bill also.

Remainder in Chattel Real — Executory Devise — Rule in Shelley's Case.

Hughes *v.* Nicholas, 70 Md. 484; 17 A. 398.

McSherry, J. The single question involved in this appeal is what estate did Jane Shaw take, under the will of George Ackerman, in certain leasehold property? It is insisted by the appellant that she took an absolute interest therein, while the appellee contends that she was entitled only to a life-estate, and that upon her decease the remainder passed to Christiana Snyder. The will of George Ackerman must determine this con-

troversy. It bears date May 16, 1831, and was admitted to probate October 28, 1834. The only clauses which have any reference to the question before us are in the following words: "And to my adopted child, Jane Shaw, whom I have raised from infancy, and who now lives with me, I give and bequeath all my property, consisting of houses and vacant lots, situate on the west side of High street, between York and Pitt streets, in the city of Baltimore, during her natural life, with remainder over to the heirs of her body, if she should have any, but, in case she should die without such heirs, then the said remainder to my cousin, Christina Snyder, widow as aforesaid, to her and her heirs forever. And I give all the residue of my property, of whatsoever name or nature, to the said Jane Shaw, without limitation or restriction," etc. It is conceded that the property referred to in the first of the two clauses quoted was leasehold property. Jane Shaw married William Campbell. She died in 1886 without ever having had issue. She left a last will and testament, whereby, after making small bequests to other persons, she gave the residuum of her estate to John W. Hughes, a grandson of her deceased husband, and she appointed him executor. He is the appellant in this case. Christiana Snyder also died, leaving a will by which she gave the residuum of her estate to her grandchildren. The appellee is administrator *d. b. n. c. t. a.* of her estate.

It has been argued that the intention of George Ackerman, apparent on the face of the will, was to give Jane Shaw merely a life-estate in the leasehold property, and that this intention must control the construction to be placed on the language used in making the bequest of that property to her. It is undoubtedly true that a testator's intention, when legally manifested, will be given effect to, unless it violates some fixed principle of law, or would, if gratified, break down some settled rule of property, or unless it be defeated by the use of technical words whose meaning, when they are found in wills, is inflexible and unvarying. For instance, no matter how clear may be the intention to create a perpetuity, it cannot be gratified, because forbidden by law; and even though the intention to give but a life-estate may be perfectly evident, yet if, in attempting to create it, words have been employed which have invariably been held to carry the fee, the fee, and not a mere life-estate, will pass. There is perhaps no rule of property more deeply rooted in the jurisprudence of this State than that which is known as the "rule in Shelley's Case." It is a rule of tenure which is not only independent of, but generally operates to subvert, the intention; and so firmly is it, with its qualifica-

tions, established here, that, as said by this court in Shreve *v.* Shreve, 43 Md. 394, "nothing but an act of the legislature can strike it out of our system of real law." The definition of the rule given by Mr. Preston (1 Prest. Est. 263), adopted with slight modifications by Chancellor Kent (4 Kent Comm. 215), and quoted with approval in Ware *v.* Richardson, 3 Md. 544, is so familiar that it need not be repeated in this opinion.

If the subject of the gift to Jane Shaw had been real estate, she would have taken, under the rule, an estate in fee-tail, which by the operation of our law of descents would have been converted into an estate in fee-simple, notwithstanding the most positive and unequivocal declaration that she should take only an estate for life. But it is supposed a different result must follow in this case because the gift relates to personal property. In support of this position, our attention has been called to the cases which hold that in respect to personal estate attention is paid to any circumstance that seems to afford ground for construing a limitation after dying without heirs or without issue to mean a dying without heirs or issue living at the death of the party, in order to support a bequest over, though as to real estate the construction is generally otherwise. Walls *v.* Woodland, 32 Md. 104; Gable *v.* Ellender, 53 Md. 311. But the principle which strikes down as void, because too remote, a limitation in remainder after an indefinite failure of issue, is not the one upon which the rule in Shelley's Case is founded, nor upon which the decision of the case before us depends. If the rule in Shelley's Case is applicable to leasehold estates as well as to a freehold, the case is entirely free from difficulty. In Butterfield *v.* Butterfield, 1 Ves. Sr. 154, the testator directed that £400 should be put on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body, and if it should so happen that he should die without heirs of his body, it should go to his youngest son B., Lord Hardwicke held that his son T. should take the whole absolute interest. In Garth *v.* Baldwin, 2 Ves. Sr. 646, personal property was limited to trustees to pay the profits to Edward Turner Garth for life, and afterwards to pay the same to the heirs of his body. The lord chancellor held that the case was reduced to this: a gift of personal estate to one for life, and the heirs of his body, that must vest the property in him, whether the testator intended it or not. In Atkinson *v.* Hutchinson, 3 P. Wms. 259, the lord chancellor stated that if a term of years be limited to A. for life, remainder to the heirs of his body, A. would take the whole interest. In Elton *v.* Eason, 19 Ves. 78, the master of the rolls said: "It is clearly settled that

a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate-tail in land gives the whole interest in personal property, which is incapable of being entailed." And in Horne *v.* Lyeth, 4 Har. & J. 431, which, though not a decision by the court of appeals, has been followed and approved in many cases by this court, it was distinctly determined "that, if a leasehold estate is limited to one for life, the remainder to the heirs of his body, the whole interest vests in the first taker and the words 'for life' will not be sufficient to restrict his interest to a life-estate." This was recognized in Warner *v.* Spriggs, 62 Md. 14.

It would seem, then, to be perfectly clear that the bequest to Jane Shaw is, by analogy at least, directly within the rule. The gift is of a leasehold interest to Jane Shaw during her natural life, with remainder over to the heirs of her body, if she should have any, as a class of persons to take in succession from generation to generation. The limitation to the heirs entitled her to the absolute interest, which was not restricted by the words "if she should have any heirs." The second clause quoted from the will cannot affect this conclusion. It is claimed its provisions plainly indicate that the testator intended to give Jane Shaw only a life-estate under the first clause; but, even if this should be conceded, the result would not be changed, because no matter how evident the intention to create but a life estate may be, when the words actually used bring the gift within the rule the intention must give way, and the fixed rule must be followed. Accordingly, Hughes, who claims under the will of Jane Shaw, is entitled to the estate, and the funds brought into court, being the rent due by the lessee of the term, are payable to the appellant. There was error, therefore, in the decree below, which denied the appellant's right to these funds, and it must be reversed. The cause will be remanded, that a decree may be passed in conformity with this opinion.

CHAPTER XV.

POWERS OF APPOINTMENT.

Potter *v.* Couch, 141 U. S. 296.
Mut. Life Ins Co *v.* Shipman, 119 N. Y. 324; 24 N. E. 177.
Bower *v.* Chase, 94 U. S. 812 (1876).

Powers Distinguished from Estates — Devise to Executors to Sell.

Potter *v.* Couch, 141 U. S. 296.

Appeals from the circuit court of the United States for the northern district of Illinois.

These were appeals from a decree in equity by various persons asserting claims to the real estate devised by Ira Couch, who died January 28, 1857, to his brother, James, and to his nephew, Ira, by his will dated November 12, 1855, and duly admitted to probate March 21, 1857, by which he appointed his wife, Caroline E. Couch, his brother, James Couch, and his brother-in-law, William H. Wood, executors and trustees, and devised and bequeathed all his property, real and personal, to them in trust for the term of 20 years, and for certain uses and purposes; and then (after payment of debts and legacies), in equal fourths, to his wife, to his daughter and her children, to his brother, James, and to his nephew, Ira, the son of James, with devises over in case of alienation. The material provisions of the will are copied or stated in the margin; and so much of the facts as is necessary to the understanding of the questions of law decided was as follows: —

It was contended by some of the parties that the real estate devised by his will was owned jointly by the testator and his brother, James. But upon the whole evidence it clearly appeared that although James lived with the testator, and helped him in his business, they were not partners, and, as James knew, all the real estate was bought and paid for by the testator out of his own money, and the deeds were taken in his name. The property belonged to the testator; and James had no title in it, legal or equitable, except under the will. Caroline E. Couch, the testator's daughter, was married January 28, 1867, to George B. Johnson, having before her marriage, and by indenture with the trustees named in the will, appointed them to be trustees for the benefit of herself and her children under the twentieth clause of the will. Three children of this marriage were

born before 1877. The testator left real estate worth about $1,000,000, consisting of nine lots of land in the heart of the city of Chicago, on two of which stood the Tremont House; and left personal property to the amount of $11,000; and owed debts amounting to $112,000, besides unpaid taxes on real estate. The trustees under the will — Woods collecting the rents and having the principal management — improved the real estate, so as to produce a large net income, until the great fire of October, 1871, destroying all the buildings. In 1872 and 1873 the trustees erected new buildings on the property at an expense of $1,000,000, of which they borrowed $750,000 on mortgage executed by the trustees, as well as by the widow, James, Ira, and the daughter, and her husband, individually, of all the nine lots, payable November 1, 1877, with yearly interest at 8 per cent. On the completion of the new Tremont House, the trustees being unable to find any person, not interested in the estate, who would undertake to pay a fair rent and provide the necessary furniture, a lease thereof was made on November 15, 1873, by the widow, James Couch, and William H. Wood, as trustees under the will and as trustees of the daughter, and by the widow, James, Ira, and the daughter and her husband, individually, for 10 years to James Couch, who agreed to furnish it and carry it on as an hotel, and to pay one-tenth of the gross amount of his receipts therefrom until February 1, 1877, to the widow and Wood as joint trustees with himself under the will, and after that date to pay to the widow, to Ira, and to the daughter's trustees three-fourths of such tenth, retaining the other fourth himself. James Couch carried on the hotel accordingly, but unsuccessfully, until January 18, 1879, when his lease was terminated, and the hotel was leased to another person. In December, 1876, the mortgagee agreed with the trustees named in the will to extend the term of payment of the principal of the mortgage debt, and to reduce the rate of interest, provided the whole estate should continue to be managed as before, and Wood should remain in the principal charge and control thereof. On January 8, 1877, James Couch and wife, the testator's widow, the daughter and her husband, and Ira and his wife, in their individual names, and the widow, James Couch, and William H. Wood, as trustees of the daughter, executed and delivered to Wood, a power of attorney, containing these recitals: "Whereas by the will of Ira Couch, deceased, all of his estate, both real and personal, was devised and bequeathed to James Couch, Caroline E. Couch, and William H. Wood, in trust, for the period of twenty years from the time of his death, which period

will expire the twenty-eighth day of January, 1877, and upon the termination of said trust to the said James Couch, and Caroline E. Couch, and to Ira Couch, son of said James Couch, and Caroline E. Johnson, daughter of said testator and now the wife of George B. Johnson, one-fourth thereof to each of said devisees;" "and whereas, the said Caroline E. Johnson did, prior to her marriage, and pursuant to the provisions of said will, by her deed of trust appoint the said James Couch, Caroline E. Couch, and William H. Wood trustees of all her share and interest in said estate; and whereas, by reason of the destruction of the buildings belonging to said estate, and situate upon said lands, by fire, the said trustees under said will have, as such trustees, incurred a large indebtedness in rebuilding the same, and for other purposes beneficial to said estate, and which indebtedness is a lien or incumbrance thereon; and whereas, it is deemed advantageous to the undersigned, devisees as aforesaid, as well as to the creditors of said estate, that the same should, from the time of the expiration of said period of twenty years, be managed as a whole by some person appointed and agreed upon by the parties interested, to the end that sales of said estate, or parts thereof, may be made from time to time to meet the said indebtedness, that said estate may in the meantime be kept rented, and the income therefrom applied to the payment of the interest on indebtedness, the taxes, premiums on insurance, and the expenses for repairs, and for the management of the estate." This power accordingly authorized Wood, on and after January 28, 1877, to enter upon and take possession of all the real estate devised; to rent it, and to collect the rents and also all arrears of the rent under leases made by the trustees under the will; to pay taxes and assessments, and the interests and principal of debts against the estate, and all expenses of repairs, preservation, and management thereof, and to borrow money when necessary for these purposes, and to sell and convey the whole or any part of the estate whenever and upon such terms as in his judgment should be for the best interest of the constituents; and provided that it should be irrevocable, except that after January 28, 1880, a majority of them, or, on giving six months' notice in writing, any one of them, might "revoke this power of attorney and annul this agreement."

By reason of the embarrassment caused by the financial panic of 1873, the real estate depreciated in value, so that it was worth less than the sum due on the mortgage, and during the years 1876, 1877, and 1878 the income was insufficient to pay the interest on the mortgage debt, taxes, insurance, and expenses.

The estate afterwards increased in value until 1884, when the income had become sufficient to pay annual expenses and interest and a large part of the principal. The testator's debts, and the legacies given by the twelfth and thirteenth clauses of the will, as well as the annuities to the testator's sister and to his mother-in-law under the seventh and eighth clauses, were all duly paid before 1877; those annuitants having died before that time. The annuities to his widow and daughter under the tenth clause were paid until the fire of October, 1871, but were not paid in full afterwards; and his brother, James, was paid more than his share of the income under the eleventh clause. The estate was never divided by the executors among the devisees of the residue, because of the impossibility of making partition of the most valuable lots, or of selling them, except at a great sacrifice. On February 15, 1879, judgments to the amount of $6,000 were recovered against James Couch, in a court of the State of Illinois, on debts contracted since January 28, 1877, and executions thereon were forthwith taken out and returned unsatisfied. On February 24, 1879, one Sprague, who recovered two of those judgments, amounting to $1,097.85, brought a suit in equity in that court, upon which a receiver was appointed, to whom, by order of that court, on March 29, 1879, James Couch executed a deed of all property, equitable interests, things in action, and effect belonging to him. In 1881 and 1882, James Couch's undivided fourth of the real estate devised was levied on and sold by the sheriff on *pluries* executions issued on Sprague's judgments at law. On May 10, 1879, one Brown, as trustee for Howard Potter, recovered judgment in the circuit court of the United States against James Couch for $15,038.92 on a debt contracted in 1874, and in 1881 caused an *alias* execution thereon to be levied on the same undivided fourth, and purchased the same at the marshal's sale on execution. On February 9, 1881, James Couch and Elizabeth G. Couch, his wife, executed a deed of all their interest in that fourth to William E. Hale, expressed to be for a nominal consideration, but the real consideration for which was a contemporanous agreement between the wife and Hale, by which Hale agreed to buy up the judgments existing against James Couch, and to sell the interest conveyed to him by the deed, and, after reimbursing himself for his expenses, to pay one-half of the proceeds to her, and hold the other half to his own use. Hale bought up the judgments recovered February 15, 1879, being about one-third of the judgments against Couch, as well as the title under the sheriff's sale aforesaid; but on November 16, 1882, sold them again to Potter, and never

bought up any of Potter's claims, or paid anything to Elizabeth G. Couch.

Ira Couch, the testator's nephew, came of age January 9, 1869, and never had any children. His interest in the estate of the testator was conveyed by him, being insolvent, on January 29, 1877, to one Dupee, as a trustee for his creditors, with authority to sell at private sale; by Dupee, on November 26, 1881, to one Everett, in consideration of the sum $1,000 paid by Elizabeth G. Couch, mother of Ira; by Everett, on November 28, 1881, to her; and by her, on February 28, 1889, back to Ira. On March 9, 1885, Caroline E. Johnson, the testator's daughter, conveyed to her husband all right, title, and interest she might or could have in real estate under the nineteenth clause of the will. On July 5, 1885, she died, leaving her husband and three children surviving her. On July 14, 1884, James Couch, Caroline E. Couch, and William H. Wood, being the executors and trustees, and the first two of them devisees named in the will, filed a bill in equity in the State court to obtain a construction thereof, to which Caroline E. Johnson and her husband and children, Elizabeth G. Couch, Potter, Hale, Ira Couch, the judgment creditors of James Couch, and the receiver appointed in Sprague's sit in equity, were made parties. On August 4, 1884, Potter filed in the circuit court of the United States a bill for partition of the real estate of the testator, making all other parties interested defendants. On October 23, 1884, the bill for the construction of the will, and on May 15, 1885, the bill of Sprague, were removed into that court. On August 3, 1885, these three causes were consolidated by order of the court; and on November 18, 1887, after the various parties had filed answers stating their claims, it was ordered that each answer might be taken and considered as a cross bill.

No question was made as to the share devised to the wife by the second clause, or as to the share devised to the daughter and her children by the third and twentieth clauses of the will. The claims to the various parties to the shares devised to the testator's brother, James, by the fourth clause, and to the testator's nephew, Ira, by the fifth clause, were as follows: Potter claimed the share of James under the judgments and the sales on execution against him. Hale claimed the some share under the deed to him from James and wife. James claimed his share under the fourth clause of the will. Ira claimed his share under the fifth clause; and also claimed the share of James, on the ground that by reason of the alienations thereof to Potter and to Hale, the devise over in the nineteenth clause to his

children took effect. The daughter's husband and her children, respectively, claimed the shares of both James and Ira, contending that, by reason of the alienations thereof, they vested, under the ultimate devise over in the nineteenth clause, in the daughter and her heirs; the husband claiming under his wife's deed to him, and the children claiming under the twentieth clause of the will by reason of her death. By the decree it was declared that the devised estate vested, at the expiration of 20 years, from the testator's death, one-fourth in fee to the widow, one-fourth in fee in James, one-fourth in fee in Ira, and the remaining fourth in the daughter for life, with remainder in fee to her children; and the claims of Potter, of Hale, and of the daughter's husband and children to the shares of James and Ira, and of Ira to the share of James, were disallowed. Potter, Hale, the daughter's husband, and her children, respectively, appealed from the disallowance of their claims; and James Couch appealed from so much of the decree as declared that legal title under the residuary devises vested at the expiration of 20 years from the testator's death. The five appeals were submitted together on printed briefs and arguments.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The matters in controversy concern those shares only of Ira Couch's real estate which he devised to his brother, James, and to his nephew, Ira, the son of James.

1. In order to ascertain the nature and the time of vesting of their interests, it is important, in the first place, to determine the extent and duration of the trust-estate of the executors and trustees named in the will, bearing in mind the settled rule that whether trustees take an estate in fee depends upon the requirement of the trust, and not upon the insertion of words of inheritance. Doe *v.* Cosidine, 6 Wall. 458; Young *v.* Bradley, 101 U. S. 782; Kirkland *v.* Cox, 94 Ill. 400. In the first clause of the will the testator appoints his wife, his brother, James, and his brother-in-law Wood, "executors and trustees" of his will, and devises and bequeaths to them all his estate, real and personal, "for the term of twenty years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose, or object;" authorizes them to lease his real estate at their discretion, and out of any surplus funds, to improve his real estate, to purchase other real estate to be held upon the same trust, and to lend money on bond and mortgage; but in order that their doings may not create any obstacle to the division of

his real estate at the end of the 20 years, provides that they shall not make leases, or lend money on mortgage, beyond 20 years, or purchase or improve by building after 16 years from his death; and he also authorizes them to mortgage real estate for the purpose of rebuilding in case of destruction by the elements. In the next four clauses he devises and bequeaths to his widow, daughter, brother, and nephew, respectively, "after the expiration of the trust-estate vested in my executors and trustees for the term of twenty years after my decease," one-fourth part of all his estate, both real and personal, after payment of debts and legacies, which he charges upon the real estate. In the eleventh clause, he directs his executors to pay to his brother a certain part of the income "until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner." And in the twenty-first clause he declares his wish that Wood shall collect the rents and have the general care and supervision of the affairs of the estate during the same period. These provisions, had the testator said nothing more upon the subject, might have been construed as assuming or implying that the trust-estate was to terminate at the end of 20 years from the testator's death, without any act of conveyance on the part of the trustees. But the will contains other provisions concerning the powers and duties of the trustees, which are wholly inconsistent with such a conclusion.

The sixteenth clause is as follows: "I will and direct that no part of my estate, neither the real nor the personal, shall be sold, mortgaged (except for building), or in any manner incumbered until the end of twenty years from and after my decease, when it may be divided or sold for the purpose of making a division between my devisees as herein directed." The very object of this clause is to define when and for what purposes the trustees may mortgage or may sell the real estate. Before the end of 20 years it is neither to be mortgaged (except for building, as allowed in the first clause) nor to be sold. At the end of 20 years all authority to mortgage it is to cease, but "it may be divided or sold for the purpose of making a division between my devisees as herein directed." This division or sale (like all sales or mortgages spoken of in this clause) is evidently one to be made by the trustees under authority derived from the testator, and while the legal title remains in them; not a judicial division or sale for the pupose of partition after the legal title has passed to the residuary devisees. Again, in the eighteenth clause the testator directs that, in the event of any of the legatees or annuitants being alive at the end of 20 years

after his death, there shall be a division of all of his estate at that time, "anything herein contained to the contrary notwithstanding;" and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors." This clause puts beyond doubt the intention of the testator, not only that the division of his estate, and the assignment and conveyance of the several shares to each devisee, shall be made by his executors, but that the question which share shall be charged with the payment of any legacy or annuity shall depend upon the act of the executors in making the division among the devisees. Although, at the expiration of 20 years from the testator's death, all the legacies and annuities to others than the residuary devisees had in fact been paid, yet the duty still remained in the executors and trustees to make a division, by sale if necessary. Under the circumstances of this case, it was impracticable to make the division, either by the partition of the lands themselves, or by selling them and distributing the proceeds, immediately upon the expiration of the 20 years; and until a division was made, in one form or the other, by the executors and trustees, the legal title must remain in them. The sale and conveyance by them, whether directly to the residuary devisees, or to the third persons for the purpose of paying the proceeds to those devisees, was not in the exercise of a power over an estate vested in other persons, but was for the purpose of terminating an estate vested in the executors and trustees themselves, by conveying it to others. The twentieth clause, by which the daughter's share, in case of her marriage, is to be conveyed at the expiration of the twenty years, by the trustees named in the will, to trustees for the benefit of herself and her children; and the twenty-second clause, by which the share of the widow, in case of her marrying again, is to be held by the executors and trustees in trust for her, — are also worthy of notice in this connection, although they might not, standing alone, affect the time of vesting of the legal title in the shares of the brother and the nephew. Wellford *v.* Snyder, 137 U. S. 521; 11 Sup. Ct. Rep. 183.

There can be no doubt that all the powers conferred, and all the trusts imposed, were annexed to the office of executors, and not to a distinct office of trustees. And, taking the whole will together, it is quite clear that the legal title of the executors and trustees did not absolutely terminate upon the expiration of twenty years from the death of the testator, because it was necessary for the purpose of enabling them to execute the trusts, and

to carry out the provisions of the will, that the legal title should be and continue in them until they had, by sale or otherwise, settled the estate, and conveyed to the devisees severally their shares in the estate or its proceeds. The testator doubtless intended that after the expiration of the twenty years the estate should cease to be held and managed by his executors and trustees as a whole, and should be divided into four parts to be held in severalty by or for his residuary devisees. But he intended, and expressly provided, that the division should be made by his executors and trustees; and therefore their trust estate could not terminate until they had made the division and conveyed the shares. McArthur *v.* Scott, 113 U. S. 340, 377; 5 Sup. Ct. Rep. 652; Kirkland *v.* Cox, 94 Ill. 400; Perry Trusts, §§ 305, 315, 320. Whether, in case of unreasonable delay on their part to make the division, a court of equity might have compelled them to do so, is a question not presented by this record.

The decision of the Supreme Court of Illinois in Kirkland *v.* Cox, above cited, is much in point. In that case the testator devised and bequeathed all his estate, real and personal, to trustees, to control and manage it, and to make such disposition of it as should in their judgment increase its value; to pay to his daughter such installments as they should deem sufficient for her support until she reached the age of 35 years, and then to convey the estate to her in fee; authorizing them, however, if she should be then married to a man whom they thought unworthy, to continue to hold the title in trust during his life; and further providing that, if she died without issue, the whole estate, after paying certain legacies, should "be divided equally between" three charitable corporations. It was held that the powers conferred on the trustees implied a power to sell the lands, and convert them into money or interest-bearing securities and, therefore, that the trustees took and held the title in fee-simple, notwithstanding the death of the daughter before reaching the age of 35 years; the court saying: "The power implied to sell is to sell the whole title, and to this essential the power to convey that title, requiring as a condition precedent, a fee-simple estate in the trustees. The property is devised to the trustees to sell and convey if they deem it advisable, or to hold and control until it is to be transferred as directed; and in the contingency that has arisen it was intended that it should be the duty of the trustees to make the equal division of the property between the corporations designated and convey it accordingly; for the grant to these corporations is in severalty, and not as tenants in common, and their title must necessarily rest on the conveyance of the trustees." 94 Ill. 415. The cases cited against

this conclusion differ widely from the case at bar. The two most relied on were Minors *v.* Battison, L. R. 1 App. Cas. 428, in which the facts were very peculiar, and there was much diversity of opinion among the judges before whom it was successively brought; and Manice *v.* Manice, 43 N. Y. 303, in which the construction adopted was the only one consistent with the validity of the will under the statutes of New York.

2. From this view of the nature and duration of the estate of the trustees, it necessarily follows that by the terms of the fourth and fifth clauses of the will, devising and bequeathing to the testator's brother and nephew, respectively, "after the expiration of the trust-estate vested in my executors and trustees," "one-fourth part of all my estate, both real and personal" (after the payment of debts and legacies, which he charged upon the real estate), no legal title in any specific part of the estate, and no right of possession, vested in either of them until the trustees had divided the estate, and conveyed to each of them one-fourth of the estate, or of the proceeds of its sale; but, on well-settled principles, an equitable estate in fee in one-fourth of the residue of the testator's whole property vested in the brother and in the nephew, respectively, from the death of the testator. Cropley *v.* Cooper, 19 Wall. 167; McArthur *v.* Scott, 113 U. S. 340, 378, 380; 5 Sup. Ct. Rep. 652; Phipps *v.* Ackers, 9 Clark & F. 583; Weston *v.* Weston, 125 Mass. 268; Nicoll *v.* Scott, 99 Ill. 529; Scofield *v.* Olcott, 120 Ill. 362; 11 N. E. Rep. 351. To the suggestion that the will violated the rule against perpetuities, which prohibits the tying up of property beyond a life or lives in being and twenty-one years afterwards, it is a sufficient answer that after twenty years from the death of the testator, and after the death of the widow and daughter (if not before), the title, legal and equitable, in the whole estate would be vested in persons capable of conveying it. Waldo *v.* Cummings, 45 Ill. 421; Lunt *v.* Lunt, 108 Ill. 307.

3. Nor is the estate of the residuary devisees affected by the nineteenth clause of the will, which is in these words: "It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuities and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same

manner as if such child or children had actually inherited the same; and in the event of such person or persons having no children, then to my daughter and her heirs." The devise over in this clause cannot, indeed, by reason of the words, "gifts, legacies, annuities, and charges," and "bounty or bounties," in the preamble, be confined to the legacies and annuities given by the testator and charged on his real estate, by clauses 6 to 13, inclusive, and by clause 18. So to hold would be utterly to disregard the comprehensive and decisive words, "devisees or legatees," "legacy or devise," and "share intended for such devisee or legatee," by which the testator clearly manifests his intention that the devise over shall attach to the shares of his real estate devised to his widow, daughter, brother, and nephew, respectively, by clauses 2, 3, 4, and 5, except so far as its effect upon the shares of the daughter and the widow may be modified by the trust created for their benefit by clauses 20 and 22. The testator having declared his will that the devises of the shares shall be "for the personal advantage of" the devisees and that "no creditors or assignees or purchasers shall be entitled to any part," and having directed the devise over to take effect "if either of the devisees shall in any way or manner cease to be personally entitled to the devise made for his benefit," the devise over of the shares of the brother and the nephew, if valid, would take effect upon any alienation by the first devisee, whether voluntary or involuntary, by sale and conveyance, by levy of execution, by adjudication of bankruptcy, or otherwise; or, at least, upon any such alienation before his vested equitable estate became a legal estate after the expiration of the 20 years. But the right of alienation is an inherent and inseparable quality of an estate in fee-simple. In a devise of land in fee-simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Co. Litt., § 360; *Id.* 206*b*, 224*a*; 4 Kent. Comm. 131; McDonough *v.* Murdoch, 15 How. 367, 373, 375, 412. For the same reason a limitation over, in case the first devisee shall aliene, is equally void, whether the estate be legal or equitable. Howard *v.* Carusi, 109 U. S. 725; 3 Sup. Ct. Rep. 575; Ware *v.* Cann, 10 Barn & C. 433; Shaw *v.* Ford, 7 Ch. Div. 669; In re Dugdale, 38 Ch. Div. 176; Corbett *v.* Corbett, 13 Prob. Div. 136; Steib *v.* Whitehead, 111 Ill. 247, 251; Kelley *v.* Meins, 135 Mass. 231, and cases there cited. And on principle and according to the weight of authority (notwithstanding opposing *dicta* Cowell *v.* Springs Co., 100 U. S. 55, 57, and in other books), a restriction whether by way of condition or devise over, on any and all alienation, although for a limited time, of an estate in

fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. Roosevelt *v.* Thurman, 1 Johns. Ch. 220; Mandlebaum *v.* McDonell, 29 Mich. 78; Anderson *v.* Cary, 36 Ohio St. 506; Twitty *v.* Camp, Phil. Eq. 61; In re Rosher, 26 Ch. Div. 801.

The cases most relied on, as tending to support a different conclusion, are two decisions of this court, not upon devises of real estate, but upon peculiar bequests of slaves, at times and places at which they were considered personal property. Smith *v.* Bell, 6 Pet. 68; Williams *v.* Ash, 1 How. 1. In Smith *v.* Bell the general doctrine was not denied; and the decision turned upon the construction of the words of a will by which a Virginia testator bequeathed all his personal estate (consisting mostly of slaves) to his wife, "to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of" his son. This was held to give the son a vested remainder, upon grounds summed up in two passages of the opinion, delivered by Chief Justice Marshall, as follows: "The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them." 6 Pet. 76. "The limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer, of the slaves, to such a disposition of them as may be made by a person having only a life estate in them." 6 Pet. 84. In Williams *v.* Ash, a Maryland testatrix bequeathed to her nephew all her negro slaves, naming them, "provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life." One of the slaves was sold by the nephew, and, upon petition against the purchaser, was adjudged to be free. As stated by Chief Justice Taney, in delivering the opinion of the court, and recognized in the statute of Maryland of 1809, c. 171, therein cited: "By the laws of Maryland as they stood at the date of this will, and at the time of the death of the testatrix, any person might, by deed or last will and testament, declare his slave to be free after any given period of service, or at any particular age or upon the performance of any condition, or on the event of any contingency." 1 How. 13; 3 Kilty's Laws. The condition or contingency, forbidding the slaves to be sold or carried out of the State, was, as applied to that peculiar kind of property, a humane and reasonable one. The decision really turned upon the local law, and appears to

have been so understood by the court of appeals of the State in Steuart *v.* Williams, 3 Md. 425. Chief Justice Taney, indeed, going beyond what was needful for the ascertainment of the rights of the parties, added: "But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold or removed out of the State by the first taker, it is evident upon common law principles that the limitation over would have been good;" citing Doe *v.* Hawke, 2 East, 481. But the case cited concerned an assignment of a leasehold interest only, and turned upon the construction of its particular words, no question of the validity of the restriction upon alienation being suggested by counsel or considered by the court; and the *dictum* of Chief Justice Taney, if applied to a conditional limitation to take effect on any and all alienation, and attached to a bequest of the entire interest, legal, or equitable, even in personalty, is clearly contrary to the authorities. Bradley *v.* Peixoto, 3 Ves. 324; Tud. Lead. Cas. Real Prop. (3d Ed.) 968, and note, in re Dugdale, 38 Ch. Div. 176; Corbett *v.* Corbett, 13 Prob. Div. 136; Steib *v.* Whitehead, 111 Ill. 247, 251; Lovett *v.* Gillender, 35 N. Y. 617.

The case at bar presents no question of the validity of a proviso that income bequeathed to a person for life shall not be liable for his debts, such as was discussed in Nichols *v.* Levy, 5 Wall. 433; in Nicholas *v.* Eaton, 91 U. S. 716, and in Spindle *v.* Shreve, 111 U. S. 542; 4 Sup. Ct. Rep. 522. In Steib *v.* Whitehead, above cited, the Supreme Court of Illinois, while upholding the validity of such a proviso, said: "We fully recognize the general proposition that one cannot make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself; for that would be, in effect, to give and not to give, in the same breath. Nor do we at all question the general principle that, upon the absolute transfer of an estate, the grantor cannot by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either of these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee-simple,

and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by mere private contract. This cannot be done." 111 Ill. 251. The restraint sought to be imposed by the nineteenth clause upon any alienation by the brother or by the nephew of the share devised to him in fee being void for repugnancy, it follows that upon such alienation, or upon an attempt to alienate, his estate was not defeated, and no title passed, under the devise over, either to the nephew in the share of the brother, or to the daughter or her children in the share of the brother or of the nephew; and therefore nothing passed by the daughter's deed to her husband.

For the reasons already stated, the appeal of the nephew, Ira Couch, from so much of the decree below as declared the legal title under the residuary devises to have vested at the expiration of 20 years from the testator's death, is well taken; and the equitable estate in fee in one-fourth of the residue of the testator's property, having vested in Ira Couch from the death of the testator, passed by his deed of assignment to Dupee, and by mesne conveyances back to him. The various alienations of the share of the brother, James Couch, require more consideration.

4. The appellant Potter claims the share of James Couch under proceedings against him by his creditors, at law and in equity, the effect of which depends upon the statute of Illinois. As we have already seen, the legal title in fee was vested in the trustees, not under a passive, simple, or dry trust, with no duty except to convey to the persons ultimately entitled, but under an active trust, requiring the continuance of the legal title in the trustees to enable them to perform their duties; and until the trustees had divided the property, either by conveying the lands to the residuary devisees, or by selling them, and distributing the proceeds among those devisees, James Couch had only an equitable interest in the testator's whole estate, and no title in any specific part of his property, real or personal. Such being the facts it is quite clear that the trust was not executed, so as to vest the legal title in him, by the statute of uses of Illinois. Hurd's Rev. St. 1874, c. 30, § 3; Meacham *v.* Steel, 93 Ill. 135; Kellogg *v.* Hale, 108 Ill. 164. It is equally clear that such an equitable interest was not an estate on which a judgment at law would be a lien, or an execution at law could be levied, under the Illinois statute of judgments and executions, although the term "real estate," as used in that statute, is declared to include "lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto." Hurd's Rev. St., c. 77, §§ 1, 3, 10; Brandies *v.* Cochrane, 112 U. S. 344; 5 Sup. Ct. Rep. 194; Baker *v.* Copenbarger, 15 Ill.

103; Thomas *v.* Eckard, 88 Ill. 593; Haward *v.* Peavey, 128 Ill. 430; 21 N. E. Rep. 203. By the chancery act of Illinois, "whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money, or thing in action due to him or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof, to the defendant, except when such trust has in good faith been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." Hurd's Rev. St., c. 22, § 49. This statute, as has been adjudged by this court, establishes a rule of property, and not of procedure only, and applies to all cases where the creditor or his representative is obliged, by the nature of the interest sought to be reached, to resort to a court of equity for relief, as he must do in all cases where the legal title is in trustees, for the purpose of serving the requirements of an active trust, and where, consequently, the creditor has no lien, and can acquire none, at law, but obtains one only by filing a bill in equity for that purpose. The words "in trust," as used in the exception or proviso, cannot have a more restricted meaning than the same words in the enacting clause. Spindle *v.* Shreve, 111 U. S. 542, 546, 547; 4 Sup. Ct. Rep. 522; Williams *v.* Thorn, 70 N. Y. 270, 277; Hardenburgh *v.* Blair, 30 N. J. Eq. 645, 666. As the only title of James Couch in the property devised was an equitable interest, which could not lawfully have been taken on execution at law against him, and as the trust was an active trust, "in good faith created by," and "the fund so held in trust proceeded from," the testator, "a person other than the defendant himself," the letter and the spirit of the statute alike require that this equitable interest should not be charged for his debts. It follows that neither the judgments and executions at law nor the suits in equity against James Couch gave any lien or title to his creditors; and that the deed from him to a receiver was wrongly ordered by the State court in which one of the suits was commenced, and was rightly set aside by the circuit court since the removal of that suit.

5. The appellant Hale claims the share of James Couch under a deed from him and his wife. The interest conveyed by that deed being an equitable interest only, Hale requires the aid of a court of equity to perfect his title, and

would have to seek it by cross bill but for the order of the circuit court that each answer should be taken as a cross bill. The real consideration of that conveyance was an agreement by which Hale promised to buy up the existing judgments against James Couch, to sell the interest conveyed by the deed of James and wife, and to pay the wife one-half of the net proceeds. In fact he bought up some of the judgments only, and sold those again, and never performed his agreement in this or any other particular. Consequently he is not entitled to the affirmative interposition of a court of equity to obtain the interest included in the deed. Towle *v.* Ambs, 123 Ill. 410; 14 N. E. Rep. 689.

6. It remains only to consider the contention that by the instrument of January 8, 1877, the devisees entered into an agreement by which they took the whole estate as tenants in common, and rendered any division unnecessary; and therefore all the duties of the trustees ended, and the legal title vested in the residuary devisees, at the expiration of 20 years. Undoubtedly, those interested in property held in trust, and ultimately entitled to the entire proceeds, may elect to take the property in its then condition, and to hold it as tenants in common; but the acts showing an intention so to take must be unequivocal, and must be concurred in by all the parties interested. Young *v.* Bradley, 101 U. S. 782; Baker *v.* Copenbarger, 15 Ill. 103; Ridgeway *v.* Underwood, 67 Ill. 419; 1 Jarm. Wills (4th Ed.), 598–602. In the present case the instrument in question cannot have this effect, for two reasons. In the first place, it manifested no intention to alter in any way the existing titles of the residuary devisees, either as being legal or equitable, or as being in severalty or in common, but was simply a power of attorney, the object of which was to continue Woods management of the estate as a whole, as under the twenty-first clause of the will. In the next place, the instrument was not executed by or in behalf of all the parties in interest, inasmuch as it was not executed by any one authorized to affect the share devised for the daughter's benefit for life, and to her children or appointees after her death. By the clear terms of the twentieth clause of the will, neither the daughter nor her husband had any authority to do this, and her trustees had no power over her share until it had been conveyed or set apart to them by the trustees under the will; and, if the trustees under the will were duly constituted trustees for her and for her children (which is disputed), they had no greater power in this respect before the estate was divided, than distinct trustees would have had.

The result is that the decree of the circuit court must be affirmed in all respects, except that the declaration therein as to

the time when the legal estate of the residuary devisees vested must be modified in accordance with the opinion of this court. This conclusion, by which the brother and the nephew take the shares, originally devised to them, carries out the intention of the testator, though probably not by the same steps that he contemplated. Decree accordingly; the appellants in each appeal, except James Couch, to pay one-fourth of the costs, including the cost of printing the record.

Brewer and Brown, JJ., took no part in the decision of this case.

NOTE. — "*First.* I do hereby give, bequeath and devise unto my beloved wife, Caroline Elizabeth Couch, and my brother, James Couch, and my brother-in-law, William H. Wood, whom I hereby constitute, make and appoint to be my executrix, executors and trustees of this my last will and testament, and the survivors of them, and in the event of the death of either of them the successor appointed by the surviving trustee or trustees, all my estate, both real and personal, of every nature and description, for the term of twenty years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose or object; hereby giving and granting unto my said executors and trustees full power and lawful authority to lease my real estate at such time or times, and in such parcels, and in such way and manner, and upon such terms and conditions as to my said executors and trustees, or the survivors or successors of them, in their sound discretion, shall be deemed most advantageous and for the true interest of my estate; but no lease shall be granted of any building for a longer term than five years, and all leases shall expire at the end of twenty years from the time of my death. And I do also hereby authorize and empower my said executors and trustees, and the survivor or survivors of them, and their successors, from time to time, as they in the exercise of a sound discretion, shall deem for the true interest of the estate, to purchase with the surplus funds, belonging to my estate such real estate as they may deem proper and expedient, and take and hold the same, as such executors and trustees as aforesaid, upon the same trusts, and for the same uses and purposes, as the other real estate now owned by me; and more especially to purchase for the benefit and use of my estate, when they, my said executors and trustees, or the survivors and survivor of them, or successors, shall think it expedient so to do, any real estate which is or may be subject to any such judgment, decree, or mortgage as is or at any time hereafter may become a

lien, charge, or incumbrance for my benefit, or for the benefit of my heirs or executors, upon the same, and, again, that my said executors and trustees have the like discretion to lease the same. And I do hereby authorize my said executors and trustees, if they shall think proper so to do, to loan on real estate situate in the city of Chicago any of the surplus moneys arising from my said estate, as aforesaid, on bond and mortgage; provided, always, that such real estate shall be worth double the amount so loaned thereon, over and above any other liens and incumbrances existing against the same, and that such moneys shall not be loaned for a longer period than twenty years from my decease. And, generally, I do hereby fully authorize and empower my said executors and trustees, from time to time, to improve my real estate, and invest all surplus moneys belonging to my estate, arising from any source whatever, and not wanted immediately, or required to meet the payments and advances, legacies, annuities, and charges required to be made under this, my said will, in such way and manner as to them, my said executors and trustees, or the survivor or successors of them, in the exercise of a sound discretion, shall be deemed most safe and productive, but no moneys are to be invested except in improving my real estate or in the purchase of other real estate, or on bond and mortgage as aforesaid. And I direct that my executors or trustees, or their successors, shall not purchase or improve by building upon any real estate after the expiration of sixteen years from my decease. Relying on the fidelity and prudence of my said executors and trustees in executing the various trusts to them given and confided in and by this, my last will and testament, my executors are authorized to mortgage my real estate to improve by building on the same, only in the event of the destruction of some of my buildings by the elements, and then only to supply other buildings in the place of those destroyed. It is my will that all my just debts and the charges of funeral expenses be paid and discharged by my executors, as hereinafter named and appointed, out of my estate, as soon as conveniently may be after my decease, and the said debts become due; and I leave the charge of my funeral expenses to the discretion of my said executors.

"*Second.* I give, devise, and bequeath to my beloved wife, Caroline Elizabeth Couch, after the expiration of the trust-estate vested in my executors and trustees for the term of twenty years after my decease, one-fourth part of all my estate, both real and personal, after the payment of all my debts, funeral expenses, and the legacies in this will mentioned, which are hereby made a charge on said real estate, which part is to

be accepted by my said wife and received by her in lieu of dower.

"*Third.* I give, devise, and bequeath unto my beloved daughter, Caroline Elizabeth Couch, after the expiration of the trust-estate so vested as aforesaid, one-fourth part of all my estate, both real and personal, after the payment of all my debts, funeral expenses, and the legacies in this will mentioned.

"*Fourth.* I give, devise, and bequeath unto my brother, James Couch, after the expiration of the trust-estate so vested as aforesaid, one-fourth of all my estate, both real and personal, after the payment of all my debts, funeral expenses, and the legacies in this will mentioned.

"*Fifth.* I give, devise, and bequeath unto my nephew, Ira Couch, son of my brother, James, after the expiration of the trust-estate so vested as aforesaid, the remaining one-fourth part of all my estate, both real and personal, after the payment of all my just debts, funeral expenses, and the legacies in this will mentioned.

"*Sixth.* I hereby will and direct that the said legacies hereinafter mentioned shall be charged on my real estate, to be paid out of the rents and profits thereof as hereinafter directed.

* * * * * * * * * * * *

"*Tenth.* I give and bequeath to my wife, Caroline Elizabeth Couch, for the support of herself and daughter, from the rents of my real estate, the sum of ten thousand dollars a year until all the debts due by me are paid by my executors, and after my executors have paid such debts I give and bequeath to her for the same purpose fifteen thousand dollars a year, to be paid quarterly to her until my daughter becomes of age or is married, when my daughter may draw one-fourth of all the net rents and profits, after payment of all expenses, taxes, repairs, legacies, annuities, and other charges on my said estate; and my wife may draw ten thousand dollars a year until my nephew, Ira Couch, attains his majority, when she shall draw one-fourth of all the net rents and profits, after paying all expenses, taxes, repairs, legacies, annuities, and other charges as aforesaid.

"*Eleventh.* I give and bequeath to my brother, James Couch, for the support of himself and family, from the rent of my real estate, the sum of ten thousand dollars a year, to be paid quarterly until all the debts due by me are paid by my executors, and after such debts due by me are paid I give to him for the same purpose fifteen thousand dollars a year, to be paid quarterly to him until my nephew, Ira Couch, attains his majority, after which time I give to my brother, James Couch, one-fourth part of all the net rents, income, and profits of my estate, to be paid him by

my executors quarterly until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner.

* * * * * * * * * * * *

"*Sixteenth.* I will and direct that no part of my estate, neither the real nor the personal, shall be sold, mortgaged (except for building), or in any manner incumbered until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed.

"*Seventeenth.* It is my will that any and all real estate which may hereafter be purchased by me shall be disposed of, and is hereby devised, in the same manner and to the same persons as if owned by me at the time of making this, my last will and testament.

"*Eighteenth.* In the event of any of the legatees or annuitants being alive at the end of twenty years after my decease, it is my will, and I hereby direct, that there shall be a division of all my estate, both real and personal, at the end of said twenty years, anything herein contained to the contrary notwithstanding; and in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors.

"*Nineteenth.* It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuities, and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same; and, in the event of such person or persons having no children, then to my daughter and her heirs.

"*Twentieth.* It is my will that the estate, both real and personal, hereby devised and bequeathed to my daughter, Caroline Elizabeth, shall be vested in trustees, to be chosen by herself and my trustees herein named, before her marriage; and said trustees shall be three in number, to whom all her estate, both real and personal, shall be conveyed at the expiration of twenty years, the time hereinbefore specified for the termination of the

estate of my trustees herein, to such trustees so to be appointed as aforesaid; and it is my will that the estate, both real and personal, herein devised and bequeathed for the benefit of my daughter, shall be held by such trustees for her sole and only use and benefit, and that the same shall not in any manner be subject to the marital rights of any future husband my daughter may have, and that all moneys shall be paid by such trustees to my daughter personally, and to no other person for her, except upon her written order or assent; and it is my will that her said trustees pay to her during her life the entire net income of the estate, both real and personal, herein devised and bequeathed to my daughter, after the same shall have been conveyed to her trustees by my executors and trustees or their successors; and after the death of my said daughter I direct that the said estate, both real and personal, shall be conveyed to the children of my daughter, and, in the event of her having no children, to such person as my daughter may direct by her last will and testament.

"*Twenty-first.* It is my wish also, that William H. Wood, my executor and trustee, shall be charged with and take upon himself the collection of all rents accruing to my estate, and that he shall continue to perform the same during the period of twenty years after my decease; and for the performance of this service and other services, and for his general care and supervision of the affairs of my estate, I hereby direct that the sum of two thousand dollars per annum shall be paid to him; but in the event of his decease before entering upon said duties, or before the twenty years aforesaid shall expire, or shall decline to act as in this section provided, I hereby authorize and direct my said trustees to appoint some other person to act in his stead in collecting said rents and performing the other duties as above specified, and to pay him the same compensation therefor which said Wood would have had.

"*Twenty-second.* And, in the event of the marriage of my said wife after my decease, it is my will and I hereby authorize and direct my said trustees and executors to pay over to my said wife, and to no other person, the rents, annuities, legacies and other income herein bequeathed to my said wife, and to take her separate receipts therefor; and it is my will that my said trustees and their successors, in such case, hold the same subject to her order, in trust for my said wife, so that said property so devised and bequeathed to her as aforesaid can in no event be subject to the marital rights of such husband."

Execution of Power by Implication.

Mut. L. Ins. Co. *v.* Shipman, 119 N. Y. 324; 24 N. E. 177.

Ruger, C. J. Parson G. Shipman died January 18, 1871, leaving him surviving, Elizabeth L. Shipman, his widow, and seven children, and owning real estate, which he devised to his wife so long as she should remain his widow, and, upon her death or marriage, to the children born to him by her. The widow was made executrix of the will, and was authorized to make advances from the property, in her discretion, from time to time, to his several children "for maintenance and support," and was empowered to mortgage, lease, and dispose of such property for the purpose of carrying into effect the provisions of the will. In June, 1876, before disposing of the real estate, the widow married one Campbell, and was his wife at the time of the execution of the mortgages giving rise to this controversy. In April, 1877, the widow executed a mortgage to the Rochester Savings Bank on said real estate, in her individual name, to secure the repayment to the mortgagee of a loan of money. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will, but appeared, on its face, to be the individual obligation of the widow. This mortgage was paid from the proceeds of a subsequent loan obtained from the plaintiff upon a mortgage of the same property; and the question in this case is whether the plaintiff, having knowledge of the purpose of the borrower, — to pay the prior loan with the moneys borrowed — had notice that such moneys were not to be used for the purposes of the will; the accomplishment of such purposes being the only authority under which she was by the will authorized to mortgage such real estate.

It is not disputed but that the widow, upon the death of her husband, became entitled to a right of dower consummate in the real estate; and upon her marriage with Campbell, in 1876, the fee of the real estate vested in the children, subject to the execution of the power, and also subject to the right of dower. It was also established by the proof that both mortgage loans were, in fact, made for the benefit of Campbell, the widow's second husband, and not for any purpose of the will. The question in the case is, therefore, whether the interest attempted to be transferred by the first mortgage is ascribable to the power conferred by the will to mortgage the whole estate, or must be restricted to the individual interest which the mortgagor had as

dowress in such lands. In the absence of the provision contained in the chapter of the Revised Statutes relating to powers, there could, we think, be but little doubt that it would be held to convey only such interest as the mortgagor possessed in her individual right. It is said by Perry, in his work on Trusts (section 511), that, "if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest; for there is a subject-matter for the deed to operate upon, excluding the power." Sugden on Powers (3d Amer. Ed. 477) states the rule: "The doctrine settled by the decisions seems to be this: When the donee of a power to sell land possesses also an interest in the subject of the power, a conveyance by him, without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute it, or at least in the face of evidence disproving such intent." Kent's Commentaries (volume 4, p. 371, 11th Ed.) says: "The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach it will not execute a power." The rule of construction laid down in these authorities seems to have been established long before the enactment of our Revised Statutes, and was in the immediate contemplation of the revisors when they framed section 124, art. 3, tit. 2, c. 1, pt. 2, vol. 2 (3d Ed.), reading as follows: "Every instrument, executed by the grantee of a power, conveying an estate or creating a charge which such grantee would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein." This section is couched in broad and liberal language and seems to have been adopted for the purpose of combining in the statutory regulations regarding powers all such existing rules in respect to the subject as it was thought desirable and necessary to adopt and enforce in this country. There is no reason for supposing that the law-makers intended to change the existing rule and adopt one which should create a marked and essential difference in the law from which it had been for a long period of time in the country from whose jurisprudence our statutes in relation to powers were mainly derived. The rule was founded in reason and good sense, and was intended to provide that whenever a single power exists, under which a grantor may convey or mortgage real estate, his conveyance is

to be attributed to the exercise of the power actually possessed by him; but that whenever, in addition to a power, he is also invested with other independent interests or powers, whether legal or equitable, with respect to the same property, under the authority of either of which he may lawfully act, the rule of the statute should not apply.

There can be, we think, no question but that the mortgagor in this case came within the meaning and spirit of this rule, as a person having independent rights and interests in the property mortgaged, in addition to the testamentary power. Aside from the power, she had possession of the land under a consummate right of dower, of which she could enforce admeasurement. Although this right, while unassigned, did not give her a legal estate in the land, it is now well settled that it was a legal interest, and constituted property which was capable in equity of being sold, transferred and mortgaged by the dowress, and liable to be reached by creditors in payment of her debts. Tompkins *v.* Fonda, 4 Paige, 488; Simar *v.* Canady, 53 N. Y. 298; Payne *v.* Becker, 87 N. Y. 153; Pope *v.* Mead, 99 N. Y. 201; 1 N. E. Rep. 671; Bostick *v.* Beach, 103 N. Y. 414; 9 N. E. Rep. 41. Judge Folger, in Simar *v.* Canady, said: "We think that it must be considered as settled in this State, notwithstanding Moore *v.* Mayor [8 N. Y. 110], and some *dicta* in other cases, that as between a wife and any other than the State or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest, which will be protected and preserved to her, and that she has a right to action to that end." Judge Danforth, in Payne *v.* Becker, says: "Both upon principle and authority, therefore, we must hold that the widow's right or claim of dower, is property; that, like any other species of property, it may be reached and applied to the payment of her debts." Judge Rapallo, in Bostwick *v.* Beach, says: "The point made on the part of the defendant, that she could not dispose of her dower before it was admeasured, is decided adversely to her in the case of Payne *v.* Becker." In Pope *v.* Mead it is said that a dower right, although not admeasured, is an absolute right, which is assignable. That dower, before assignment, is an interest in lands, within the meaning of the statute of frauds, is held in Finch *v.* Finch, 10 Ohio St. 501; Lothrop *v.* Foster, 51 Me. 367; and is fairly implied in Tompkins *v.* Fonda, and Payne *v.* Becker, *supra*. It has been held that a release of an inchoate right of dower constitutes a good consideration for a promise to pay (Garlick *v.* Strong, 3 Paige, 440); and that the existence of an inchoate

right of dower in the equity of redemption of mortgaged premises constitutes a good objection to title by a vendee in an action against him for specific performance (Mills *v.* Van Voorhies, 20 N. Y. 412). Judge Selden, writing in that case upon the effect of an omission to make the wife of a mortgagor a party to a foreclosure suit, says: "Whether at common law it would be necessary to make her a party must depend upon the question whether she has any interest, either legal or equitable, complete or inchoate, in the mortgaged premises. If she has such an interest, however remote, then upon the plainest and most familiar principles, that interest cannot be affected, unless by virtue of some statute, by a suit in equity to which she is not a party; * * * and a purchaser under such a foreclosure would not obtain an unincumbered title." Such a right, although a mere chose in action, and constituting no legal estate in the land, is nevertheless one which cannot be enforced against any property other than the land, and, when enforced, creates a legal estate therein paramount to the right of those holding the legal title. A mortgage of such an interest operates as a conditional transfer of the right to enforce admeasurement of dower and enables the mortgagee to reduce to possession so much of the land as is necessary to satisfy the requirements of the mortgage.

Property capable of being sold, transferred, and delivered, or charged, by means of legal proceedings, with the payment of debts, is, we think, such an interest as enables its owners, within the meaning of the statute, to create a charge thereon. Bouv. Law Dict., tit. "Charge;" Thomas Mortg., § 66. Although the right of a dowress in lands before assignment is not an estate, it is nevertheless a charge and incumbrance upon them, and is capable of being enforced, and of producing a legal estate. It is, in that respect, similar to the right which a mortgagee has in the lands mortgaged. The interest of neither constitutes an estate in lands, but both are interests which may be pledged, transferred, or conveyed by any appropriate instrument evidencing an intent to so transfer them; and in neither case can the lands be effectually transferred by the legal owners, so as to free them, in the hands of subsequent grantees, from the respective claims of the dowress or mortgagee or their assignees. The real question under the statute would seem to be, whether the mortgagor had a transferable interest in the mortgaged premises, — one which would be available in the hands of her transferee as security for a debt. If so, then her interest was sufficient to bring her within the reason and meaning of the statute. A consideration of the object and purposes of a statute affords the safest

and most reliable guide for the ascertainment of its intent, and of the meaning and effect which should be ascribed to it. In the statute referred to, the revisers obviously did not attempt to create or define estates in land, but merely prescribed a rule of construction for the interpretation of conveyances affecting real estate, which might be executed under the authority of a power. It is quite obvious that an interest possessed by a grantor in real estate, whether legal or equitable, that is effectual to create a transfer of property is equally as persuasive as any other in furnishing a motive or reason for making or receiving a particular conveyance, and would furnish an equally strong circumstance from which the imputation of a legal intent might be derived. Both equitable and legal interests in real estate are valuable, and capable of transfer, and are equally effective in determining the intent with which a particular conveyance is made.

The widow having, therefore, an interest in the land at the time of the execution of the first mortgage, capable of being sold, transferred, and mortgaged, aside from the right to sell or mortgage under the power, her mortgage is not affected by the statute referred to. The contention that an unassigned right of dower consummate is not transferable, comes with curious effect from a party presenting a record which shows a decree in its favor under a mortgage authorizing a sale of this dower right for the satisfaction of its debt. The case or Marvin *v.* Smith, 46 N. Y. 571, cited to show the non-assignability of a right of dower, in the court below, hardly supports the proposition. That case holds only, that the wife's inchoate right of dower "was incapable of being transferred or released by her during coverture, except to one who already had, or who by the same instrument received, an independent interest in the estate; nor could she bind herself personally by a covenant or contract affecting her dower right." This case proceeded upon the disabilities attaching to the state of coverture, and did not affect the right of a widow to contract with reference to or convey a consummate right of dower. Cases relating to the question of proper parties to actions upon assigned choses in action, prior to the adoption of the code, requiring them to be brought in the name of the real party in interest, have no bearing upon the questions here presented, and need not be further considered. The order of the general term should be reversed, and the judgment of the special term affirmed, with costs in the general term and this court against the plaintiff. All concur, except Earl, J., not voting, and Peckham, J., not sitting.

Powers in Trusts — Superior Power, when Exercised, Exhausts or Supersedes Minor Powers.

Bowen *v.* Chase, 94 U. S. 812 (1876).

Mr. Justice BRADLEY delivered the opinion of the court.

The principal objects of the bill in this case, which was filed in the court below by the appellees, Nelson Chase, Eliza Jumel Pery and Paul R. G. Pery, her husband, and William I. Chase, were to establish their title to certain lands in the city of New York, known as the Stephen Jumel property, and to enjoin George W. Bowen, the appellant, from prosecuting certain actions of ejectment, one brought by him to recover certain lands in Saratoga, belonging to the late Madame Jumel, widow of Stephen Jumel, and claimed by the appellees by way of satisfaction for certain charges against her estate, as well as by conveyance from her supposed heirs, children of a deceased sister. Stephen Jumel was the owner of a lot at the corner of Broadway and Liberty streets, and of several tracts of land on Harlem Heights, in the upper part of the city of New York. In 1827 and 1828 by certain mesne conveyances, the greater portion of this property was conveyed to one Michael Werckmeister upon the following trusts, namely : —

"In trust that the said part of the second part (Werckmeister) and his heirs collect and receive the rents, issues and profits, of the said above described and hereby conveyed premises, and every part and parcel thereof, and pay over the same unto Eliza Brown Jumel (the wife of Stephen Jumel, late of the city of New York, now of Paris, in France), or at her election, suffer or permit her to use, occupy and possess the said premises, and to have, take, collect, receive, and enjoy the rents and profits thereof, to and for her own separate use and benefit, and to and for such other uses and purposes as the said Eliza Brown Jumel shall please and think fit, at her own free will and pleasure and not subject to the control or interference of her present or any future husband, and the receipt and receipts of her, the said Eliza Brown Jumel, shall at all times be good and sufficient discharges for such payments, and for such rents and profits to him the said party of the second part, his heirs, executors and administrators, and to the person or persons who are or shall be liable to pay the same; and upon this further trust, that the said party of the second part or his heirs may lease, demise, let, convey, assure, and dispose of all and singular the said above described premises, with their and every of their appurtenances, to such person or persons, for such term or terms, on such rent

or rents, for such price or prices, at such time or times, to such uses, intents or purposes, and in such manner and form, as she, the said Eliza Brown Jumel, nothwithstanding her present or any future coverture, as if she were a *feme sole*, shall, by any instrument in writing, executed in the presence of any two credible witnesses, order, direct, limit or appoint; and in case of an absolute sale of said premises or of any part thereof, to pay over the purchase money to the said Eliza Brown Jumel, or invest the same as she shall order and direct; and upon this further trust, upon the decease of the said Eliza Brown Jumel, to convey the said above-described premises, or such parts thereof as shall not have been previously conveyed by the said party of the second part or his heirs, and with respect to which no direction or appointment shall be made by the said Eliza Brown Jumel in her life-time, to the heirs of said Eliza Brown Jumel in fee-simple; and pay over to the heirs of the said Eliza Brown Jumel such moneys as shall remain in the hands or under the control of the said party of the second part or his heirs, arising from collections of the rents and profits, or of the proceeds of the sales of the above-described premises or any part thereof."

On the twenty-first day of November, 1828, the said Eliza Brown Jumel, by a deed duly executed, as required by the trust, made an appointment of all the lands conveyed in trust, in the following terms, to wit: —

"Now, I, the said Eliza Brown Jumel, do hereby deed, order, limit and appoint, that immediately after my demise, the said Michael Werckmeister, or his heirs, convey all and singular the said above-described premises to such person or persons, and such uses and purposes, as I, the said Eliza Brown Jumel, shall by my last will and testament, under my hand, and executed in the presence of two or more witnesses, designate and appoint; and for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon during his natural life, of six hundred dollars, payable to Mary Jumel Bownes, and after the death of my said husband or in case he shall not survive me, then immediately after my own death, to her, the said Mary Jumel Bownes, and her heirs in fee."

It is on this trust and appointment that the appellees rely as the foundation of their title to what is generally known as the Stephen Jumel estate. Mary Jumel Bownes, the appointee of the residuary estate, was the adopted daughter or *protégée* of Stephen Jumel and Madame Jumel, his wife, and the reputed niece of the latter. In 1832, Mary Jumel Bownes became the wife of

Nelson Chase, and had by him two children, Eliza Jumel Pery, and William I. Chase, the appellees in the case. She died in 1843, leaving these children her sole heirs-at-law, in virtue of which they claim title to the estate.

The appellant claims to be an illegitimate son of Madame Jumel, born in 1794, before her marriage to Stephen Jumel; and by virtue of that relationship, and of a statute of New York, passed in 1855, enabling illegitimate children to inherit from their mother, he claims to be her sole heir-at-law. He resists on various grounds the claim of Mrs. Chase and her heirs under the appointment. First, he contends that Madame Jumel took an estate in fee simple by virtue of the trust deed. But if not, then he contends, secondly, that by certain conveyances and appointments made by Madame Jumel, under the powers contained in the trust deed, the appointment in favor of Mrs. Chase was displaced and superseded by other estates which inured to Madame Jumel. The conveyances and appointments referred to under the second head are the following: —

First. A conveyance to Alexander Hamiliton by Werckmeister, the trustee, at the request and by the appointment of Madame Jumel, dated the 10th day of January, 1834, of ninety-four acres of land at Harlem Heights, for the expressed consideration of $15,000. On the 21st day of October, in the same year, this property was reconveyed by Hamilton to the trustee upon the same trusts declared in the original deed of trust. *Secondly.* A conveyance by the trustee, at the instance and appointment of Madame Jumel, made on the 20th day of August, 1842, to one Francis Phillippon, of a large portion of the estate, for the expressed condition of $100,000; and a reconveyance of the same property, on the same day, by Phillipon to Madame Jumel in fee for the expressed condition of one dollar. Besides these conveyances, in 1850, a lot of thirty-nine acres, being part of the property on Harlem Heights, was sold and conveyed to Ambrose W. Kingsland; and in 1853, another lot of three acres to Isaac P. Martin, which conveyances are admitted to have been made to actual purchasers for valuable consideration.

The effect of these various deeds and conveyances is now to be considered. And first, that of the trust deeds executed to Werckmeister in 1827 and 1828. There were two of these deeds, but the trusts in both were precisely the same. The limitations of this trust are very clear and plain, being of a life estate to the separate use of Eliza Brown Jumel (known as Madame Jumel), with a general power of appointment, during her life time; and on failure to make such appointment, to her heirs in fee-simple. The counsel for appellant contends that

this trust amounted to a use of the lands, and that under the old statute of uses and trusts, it operated to vest the legal estate in fee in Madame Jumel. But we think the authorities are very clear that, where a trust is created for the benefit of a married woman, for the purpose of giving her the separate use and control of lands free from the control of her husband, it will be sustained; since to merge the trust in the legal estate, or, to speak more properly, to convert it into a legal estate, would have the effect of placing the property in the husband's control by virtue of his marital rights, and would thus defeat the very purpose of the trust. Horton *v.* Horton, 7 T. R. 653; Cornish on Uses, 59 Sect. 6; Rife *v.* George, 59 Penn. 393. The legal effect of the appointment made by Madame Jumel, November 21, 1828, we do not regard as any more doubtful than that of the trust. It was manifestly this, that subject to Madame Jumel's right of disposing of the lands by will (which right she reserved) and after termination of her separate interest for life, the equitable estate in the lands was limited to her husband for life, with remainder to Mary Jumel Bownes in fee-simple. This is so obvious as to require no elaboration of argument or discussion. The interests limited to Stephen Jumel for life, and to Mary Jumel Bownes in fee, were immediate vested interests, though to take effect in possession at a subsequent period; namely at the death of Madame Jumel, and subject to be divested by her reserved power of disposing of the lands by will. The circumstances that the appointment in their favor is, in form, a direction to the trustee to convey to them, does not derogate from the vesting quality of their equitable interests in the meantime. The conveyance would be necessary for the purpose of clothing them with the legal estate. Stanley *v.* Stanley, 10 Ves. 507; Phipps *v.* Ackers, 9 Cl. & Fin. 594; 4 Kent's Comm. 204; Radford *v.* Willis, L. R. 12 Eq. Cas. 110; L. R. 7 Ch. App. 11.

The effect of the Revised Statutes of New York upon this trust is next to be considered. The chapter which contains the article on Uses and Trusts (1 Rev. Stat. 727) went into operation on the 1st of January, 1830. By this article all passive trusts were abolished, and the persons entitled to the actual possession of lands, and to the receipts of the rents and profits thereof, in law or in equity, were to be deemed to have the legal estate therein to the same extent as their equitable estate; saving, however, the estates of trustees whose title was not merely nominal, but was connected with some power of actual disposition or management in relation to the lands. Future trusts were allowed to be created to sell land for the benefit of creditors, or to create charges thereon, or to receive rents and

profits and apply them to the use of any person for life or any shorter term. In construing these provisions, the courts of New York have held that a trust for the use and benefit of the beneficiary, not requiring any action or management on the part of the trustee, except, perhaps, to make conveyances at the direction and appointment of the beneficiary, is not a valid trust within the statute, but inures as a legal estate in the beneficiary. This we think is the general result of the cases. See Leggett *v.* Perkins, 3 Comst. 297; Leggett *v.* Hunter, 19 N. Y. 454; Wood *v.* Mather, 38 Barb. 477; Anderson *v.* Mather, 44 N. Y. 257; Frazer *v.* Western, 1 Barb. Ch. 238. In applying the principle of these cases to the case before us, we are met by the alternative character of the trust, namely, that the trustee shall either collect and receive the rents and profits and pay them over to Madame Jumel, or, at her election shall permit her to use, occupy and possess the premises, and collect and receive the rents and profits to her separate use; and in either case, to convey as she might direct, or to her heirs in case no direction be given. The first of these alternatives, according to the cases, would be a valid trust; but the second is equivalent to nothing more than a mere trust for her use and benefit. During the life of her husband (who died in 1832) it might perhaps be fairly contended that the existence of the legal estate in the trustee was necessary to protect her in the enjoyment of the property as a separate estate free from the control of her husband. But after his death, the option of managing the property herself being in her, and not in the trustee, we are inclined to think that the trust became a mere passive one, and that the equitable estates were, by the Revised Statutes, converted into legal ones. This view is corroborated by the opinion of Chancellor Walworth, who had before him some questions concerning a portion of the estate in 1839, and who in relation to Madame Jumel's interest used this language: "Her equitable interest therein, as *cestui que trust*, being turned into a legal estate by the provisions of the Revised Statutes;" citing the section above referred to, Jumel *v.* Jumel, 7 Paige, 595. It is true, as said by the counsel for the appellees, that the point in question was not necessary to the decision in that case; but the observation shows the impression of an eminent judge, when the very matter was before his mind, and we have not been referred to any New York decisions derogatory to this view of the case. However, the view which we take of this case will not render it material whether the estates created by the trust and appointment became legal estates, or remained, as they were originally, merely equitable in their nature. The

more material question is as to the effect of the conveyances made by Madame Jumel, and by the trustees in obedience to her direction and appointment subsequent to the death of her husband.

We may dismiss the notion which pervades the argument of the counsel for appellees, that these conveyances were a fraud upon the appointment made in behalf of Mary Jumel Bownes (or Mrs. Chase). However proper that appointment may have been, considering the relations which the appointee sustained to Mr. Jumel and his wife, as their adopted daughter, it was, nevertheless, only a voluntary one; and the subsequent appointments can in nowise be regarded as frauds upon it. They were or they were not, such appointments as Madame Jumel still had the power to make, and their effect is to be judged of by the nature of her power and by that circumstance alone. It is contended by the counsel for the appellant that, where several distinct powers are given in the same instruments the execution of one of these powers superior in dignity to others will supersede and override the latter, though executed first. This is, to a certain extent, true, as shown and explained by Mr. Sugden in his work on Powers, in the passages referred to. The execution, for example, of a power of sale will supersede all other powers, for it must necessarily do so in order to have any effect. Mr. Sugden, in illustrating the rule, says: —

"Thus a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser, for example, a lessee; for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether any particular use was really contained in the original settlement, or was introduced into it in view of the law by the execution of a power contained in it." 2 Sugd. on Powers, 47, 48 (6th ed.).

In the present case there was a power to lease and a power to convey, assure and dispose. That the latter power included a power to sell is not only manifest from the words, but from a subsequent passage of the trust, which directs as to the disposition of the purchase-money "in case of an absolute sale." At the same time, the words are so general as to authorize a disposition in favor of a volunteer or gratuitous beneficiary. Here, then, are really two distinct powers contained in one clause; and, according to the rules laid down by Mr. Sugden, the power to sell is the superior power, and will override the other power, and supersede it if previously exercised. This rule with regard

to the relative priority and dignity of different powers in the same instrument, though depending on construction and the presumed intention of the donor, is somewhat analogous to the rules adopted by the courts in construing the act of 27 Elizabeth, representing fraudulent conveyances. It has been invariably held under that act, that a conveyance to a purchaser avoids all prior voluntary conveyances or two conveyances to purchasers, the first will take the precedency. Roberts on Fraud. Conv., pp. 33, 641. So in regard to double powers, a power to sell or exchange, when exercised overrides all other distinct powers; for they are necessarily exclusive of all others; whereas the uses appointed under other powers may possibly be served out of the estate procured by the price of the sale or by the exchange. But when a mere power to convey, as distinguished from a power to sell, is once executed in favor of a voluntary beneficiary, it cannot be revoked without reserving a power of revocation, and will not therefore be superseded by a subsequent conveyance equally voluntary made under the same power. Had the transactions in question been real and effective sales to actual purchasers for valuable consideration, they would undoubtedly have superseded the voluntary appointment in favor of Mary Jumel Bownes. The position of the appellees' counsel, that no subsequent appointment could displace this without having expressly reserved a power of revocation, cannot be maintained, for, as we have seen, a sale does have that effect. There is no doubt that the conveyances to Kingsland and Martin were valid and effectual, and the execution of those conveyances cannot be characterized as in any manner fraudulent. They were conveyances which Madame Jumel, under her original power of appointment, had a right to make, notwithstanding the previous appointment in favor of her adopted daughter. But the conveyances made to Hamilton and Phillippon were of a different character, and seem to have been intended merely as means of restoring the property to its original trusts, or of vesting it absolutely in Madame Jumel herself, freed from the said appointments. On this point there can be no dispute, so far as regards the deed to Phillippon. It was a mere formal conveyance, made to enable him to reconvey the property to Madame Jumel. As such it was simply voluntary, and could have no paramount effect over the previous appointment in favor of Mary Jumel Bownes. The conveyance to Hamilton may admit of more doubt. But looking at the whole transaction, the conveyance and the reconveyance, we cannot avoid the conclusion that it was intended as a means of getting rid of the former

appointment. The conveyance by Hamilton to Werckmeister was equivalent to a cancellation of the pretended purchase. It was not a sale made by Hamilton to Werckmeister, nor a settlement made by him for any purposes of his own. It was simply a handing back of the property. In our judgment, therefore, the two conveyances amounted to a mere formal transfer and retransfer; and if any sale was ever intended, it was rescinded by the mutual consent of the parties to it. We are of the opinion that this transaction did not, any more than that with Phillippon, affect the appointment in question, or the estate of the appointee, whether that estate is to be regarded as a legal or an equitable one.

The next question is as to the title of the appellees to equitable relief for protecting them in the title which they have thus acquired. Madame Jumel died in 1865; and the appellees immediately entered into full possession of all the property in question, both that which was derived from Stephen Jumel and that which is conceded to have been the proper estate of Madame Jumel; and they have been in possession ever since. The appellant, by his several actions of ejectment, seeks to deprive them of that possession. With regard to the Stephen Jumel property, the title to which we have been considering, and which the appellees claim under and by virtue of the said trust and appointment, it is apparent that, if the estate which they thus acquired is to be regarded as still an equitable estate, their right to the protection of a court of equity is undoubted, no matter where or in whom the legal estate may be, — whether in the heirs of Werckmeister, the trustee, or in the heirs of Madam Jumel by virtue of the conveyances referred to. On the other hand, if by virtue of the Revised Statutes the equitable estate of the appellees became converted into a legal estate, they would still have good cause to come into a court of equity for the purpose of removing the cloud upon their title created by the subsequent appointments and conveyances to Hamilton and Phillippon. These instruments on their face purport to be conveyances to purchasers, setting forth pecuniary considerations to a large amount, and, by themselves, would import such a disposition of the lands conveyed as would defeat the appointment made in favor of Mrs. Chase. It is only by bringing them into juxtaposition with the sequent transactions in each case respectively, — that is to say, by the introduction of supplemental evidence, — that they are shown to be ineffective. In view of these considerations, and of the fact that the whole title involves the true construction of the trust and the power of appointment, and the further fact that Madame Jumel

was in full possession of the property, using and treating it as her own absolute estate until her death, the appellees were perfectly justified in coming into a court of equity to have these conveyances declared void. To this extent we think they are entitled to a decree, including also a decree for a perpetual injunction against the appellant, prohibiting him from prosecuting any action or suit for the recovery of the lands embraced in the appointment made in favor of Mary Jumel Bownes, by deed of appointment executed by Eliza Brown Jumel, and bearing date the twenty-first day of November, 1828.

As to the residue of the relief prayed for, namely, that the appellees should have the lands and real estate of which Madame Jumel indisputably died seised in fee-simple appropriated to them in satisfaction of the supposed frauds committed by her against the trust, and of the engagements which she is supposed to have made to settle her estate, or a portion thereof upon Eliza Jumel Chase, in consideration of her marriage with Mr. Pery, we are unable to perceive any valid ground for granting the prayer of the bill. If there were no other objections to the decree sought in this behalf, we cannot agree with the counsel of the appellees, that any such fraud as is supposed was practiced, or if attempted that the attempt was successful; and we fail to see anything in the proofs adduced with regard to the negotiations of the said marriage sufficient to sustain such a decree. Nor do we think that the nature of the obligation created by the actions of ejectment, the character and amount of the evidence, or the number of writs, is such as to lay the foundation for the assumption of the entire controversy by a court of equity. Supposing the relationship of the appellant to Madame Jumel to be such as he pretends it is, there does not seem to be any unnecessary multiplication of actions. All the property in the city of New York is included in one writ, and the actions in Saratoga are brought against the several tenants in possession. The power of the courts of law to consolidate actions depending between the same parties, and upon the same questions in controversy, is probably sufficient to prevent any practical inconvenience not inherent in the case itself. If the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for removing a case from a court of law to a court of equity.

The claim made by the appellees to recover from the appellant the sum of $2,500, procured by him by way of compromise from a grantee of Mrs. Chase is, in our opinion, utterly groundless.

Decree reversed, and cause remanded with directions to enter a decree in conformity with this opinion.

CHAPTER XVI.

INCORPOREAL HEREDITAMENTS — COMMONS — EASEMENTS — FRANCHISES — RENTS.

Pinkum *v.* City of Eau Claire, 81 Wis. 301; 51 N. W. 550.
Tredwell *v.* Inslee, 120 N. Y. 458; 24 N. E. 651.
Cihak *v.* Kleke, 117 Ill. 643; 7 N. E. 111.
Stein *v.* Dahm, 96 Ala. 481; 11 So. 597.
Edgerton *v.* McMullan, 55 Kan. 90; 39 P. 1021.
Phillips *v.* Sherman, 64 Me. 171.
Collins *v.* Chartiers Val. Gas. Co., 131 Pa. St. 143; 18 A. 1012.
Fox *v.* Mission Free School, 120 Mo. 349; 25 S. W. 172.

Easement in Gross — Express Grant.

Pinkum *v.* City of Eau Claire, 81 Wis. 301; 51 N. W. 550.

Appeal from circuit court, Eau Claire County, E. B. Bundy, Judge.

Suit in equity by John P. Pinkum against the city of Eau Claire to compel defendant to perform the conditions of a deed granting an easement, or, in the alternative to annul the deed, and for damages for failure to perform the condition. A demurrer to the complaint was overruled, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.

Appeal from an order overruling a demurrer to the complaint. The complaint states that on the 16th day of January, 1877, Ira Mead and Charles Bolles owned in fee lot 2, in section 18, township 27, range 9, west, and on that day made and delivered to the defendant city a deed, duly executed and acknowledged, which was accepted by the city, which is set forth at length, and which, after certain recitals, proceeds as follows: "Said parties of the first part, in consideration of one dollar and other valuable considerations received, to the full satisfaction of the said party of the second part, for themselves and their heirs and assigns, doth covenant and agree with, grant and confirm unto, the said party of the second part, its successors and assigns, that it shall be lawful for the said party of the second part, its successors and assigns, and their respective tenants, officers, agents, and servants, and any other person or persons, for the benefit or advantage of the said party of the second part, or its successors or assigns, at all times freely to enter upon the lands and premises situated in the city of Eau Claire, in the county of

Eau Claire, in said State, and described as follows, to wit: Lot 2 (2), in Sec. eighteen (18), township number twenty-seven (27) north, of range number nine (9) west, for the purpose of constructing, maintaining, and operating a canal or race-way along and upon the westerly shore of the Chippewa river, as may be most practical and convenient, and a public highway along and contiguous to the westerly shore of said canal, not exceeding four (4) rods in width, upon a strip of land not exceeding eight (8) rods in width, adjacent to said Chippewa river, from the southerly line or boundary of the lot or parcel of land in said lot numbered two, conveyed by these grantors to the grantees herein, of even date herewith, to the southerly boundary of said lot number two (2), of sufficient size and capacity to connect the Chippewa river with Half-Moon lake, for the purpose of running and floating logs, timber, fence-posts, and railroad ties into said Half-Moon lake, and holding and booming the same therein, and for all other and every the uses, purposes, and objects contemplated, authorized, or required by said several legislative acts. Also to cut trees and timber, quarry stone, and dig earth, and remove and use the same for all and every the uses, purposes, and objects aforesaid; all the above-mentioned rights, privileges, and easements hereinbefore granted and vested in the said party of the second part, its successors and assigns, to be held, enjoyed and used in and upon said strip of land eight rods wide, and not otherwise; the westerly boundary line of said strip of land to be 8 rods from and parallel to the Chippewa river at high-water mark; provided, however, and these presents are upon these express conditions and reservations following, to wit: That the grantee herein, its successors and assigns, shall, before the water is let into said canal or race-way for the purpose of operating and using the same, as herein provided, construct, finish and operate the said highway along the westerly shore or side of said canal or race-way at least sixteen (16) feet in width, and so that no part of the bed of the same shall be over ten (10) feet above the surface of the water as it may or shall run in said canal or race-way at high-water mark on the Chippewa river. (2) That the grantee herein, its successors and assigns, shall pay all taxes of every name and nature which shall be lawfully assessed upon the rights, privileges and easements herein granted to them, and upon all the works, erections and structures made by them, or any of them, on said strip of land for the purposes aforesaid. (3) That the grantors herein reserve to themselves, their heirs and assigns, the right and privilege at all times to cut trees and timber, quarry stone and dig earth, and remove the same, from said strip of land. (4) That the grantors here-

in also reserve to themselves and their heirs and assigns all the stone which may be dug, quarried or blasted by the grantee herein, its successors and assigns, in the construction and completion of any of the works, and not needed or used by them, or any of them, for the uses, purposes, and objects contemplated, authorized, or required by said several legislative acts, and in the construction, completion, maintenance, and operation of said canal or race-way. (5) That none of the rights, privileges, and easements herein granted to the said grantee, its executors, successors, and assigns, shall be enjoyed by them, or any of them, beyond the boundary or limits of said strip of land eight rods in width, herein described. (6) That the said canal or race-way, and the highway and other works hereinbefore mentioned, shall be fully constructed and completed within the period of five years from the date of these presents. To have and to hold the above-granted rights, privileges, and easements in and to the lands and premises aforesaid, and every of them, unto the said parties of the second part, their successors and assigns, to their own proper use and benefit forever, for all and every the uses and purposes aforesaid, and for no other use and purpose whatsoever, subject, however, to all the aforesaid exceptions, conditions, and reservations; provided, always, and these presents are upon the express condition, that if at any time the above-mentioned contemplated works shall cease to be maintained and operated for the purposes contemplated, required, and authorized by said several legislative acts, the covenants, agreements, and grants herein contained, and these presents, shall cease, and become null and void for every purpose whatsoever."

The complaint further proceeds as follows: "That immediately thereafter the said defendant entered upon said lands so described, and did build and construct its dam, and build its race-way, and let the water therein, built the other works in connection therewith, and did use and appropriate to itself the full use and possession of that part of said lot two (2) so conveyed, and all the rights, privileges and easements therein granted; and ever since said time has maintained and used said premises, and been in the exercise of the full use and enjoyment of all said rights, privileges, and easements. And the plaintiff further shows that all the rights, considerations, covenants, and conditions in said lease which were by its terms to be performed by the said defendant, and the full use and benefit thereof, and the right to recover for the same and to enforce performance thereof, was, on the 5th day of January, 1880, duly assigned, transferred and sold to this plaintiff for a valuable consideration by the said Mead and Bolles, and the said lot

two duly conveyed to the plaintiff by said Mead and Bolles and their wives, respectively. And the plaintiff further shows that the said defendant has wholly neglected, failed and refused to perform any of the conditions, or covenants expressed in said deed on its part to be performed as a consideration for said grant, and specially failed and neglected to construct or operate the highway along the westerly shore of the canal, therein described, which was the consideration for such grant. That the banks of said lot two, from the Chippewa river, were at the times mentioned, and now are, very steep, — almost perpendicular, — to a length of about one thousand three hundred and twenty feet, and consist of a rocky ledge of sandstone. That such ledge at that time, and continuously since, was of great value as a stone quarry; the stone therein being of exceptionally good quality for building purposes, and superior to the stone in most other quarries adjacent to Eau Claire. That, in order to work said quarry successfully, it was necessary that the roadway mentioned in said deed should be constructed; and on account of the height of the banks, and they being of solid stone, the expense of constructing such a highway was very large, — at least eight thousand dollars; and to secure such highway was the chief and only purpose of the grant from Mead and Bolles to the defendant, on their part; and such condition, being attached to the grant, was the sole consideration of the purchase of the land and the rights on the premises from Mead and Bolles by the plaintiff. That by means of said highway large quantities of valuable stone could have been quarried, for which there then was, and ever since has been, a ready sale in the city of Eau Claire, within which said quarry is located, at large profits over and above the cost of quarrying the same. And that, by reason of the neglect and refusal of the defendant to construct and maintain such highway as it is stipulated and agreed, the plaintiff has been unable to work such quarry, has been deprived wholly of its use, and suffered the loss of the profit which he would have made had the road been so constructed and maintained, which profit would not have been less than five hundred dollars for each and every year he could have worked said quarry by means of access thereto and therefrom by said highway; and he has sustained damage in said sum each such year, amounting in the aggregate to the sum of seven thousand dollars."

The complaint also alleges the delivery to the city on the 28th of April, 1890, of a notice and demand that the city immediately perform the conditions of said deed, and pay to the plaintiff the damages he has sustained by reason of the non-per-

formance thereof, alleged to be $500 per year; but that the city has not complied with the demand, or taken any action towards complying with the same.

The prayer for judgment is as follows: "Wherefore the plaintiff prays for the decree of this court, that the said defendant be commanded to immediately construct and maintain such highway, and pay to the plaintiff the damages he has sustained by reason of not having constructed the same at the time and in the manner conditioned in said grant from Mead and Bolles to it; and that in case of default in so doing after such a decree, that the said deed and grant to be decreed annulled, vacated, and set aside, and the plaintiff to be decreed to hold the title to said lot two (2) free and clear from any cloud created by the same. That the defendant deliver up possession of that part of said lot which it occupied under said grant, and remove all obstructions or encroachments it has placed and now maintains upon the same; and that it be decreed to pay the damages heretofore sustained, and for such other and further relief in the premises as may be proper and agreeable to equity, and that the plaintiff have judgment for his costs and disbursements of this action."

The grounds of the demurrer are as follows: "(1) That the plaintiff has not legal capacity to sue, such defect consisting in the fact that the plaintiff is suing in the pretended capacity of the assignee of the pretended causes of action in the complaint set forth and as such assignee has no lawful right to maintain such action. (2) That several causes of action have been improperly united in said complaint. (3) That the complaint does not state facts sufficient to constitute a cause of action. (4) That the said action was not commenced within the time limited by law; and in regard to said fourth objection the defendant refers to the following statutes, which are claimed by it to limit the plaintiff's right to sue: *First*, section 4216, Rev. St. Wis.; *second*, subdivision 4, § 4221, Rev. St.; *third*, subdivisions 3, 5, § 4222, Rev. St.

Winslow, J. (*after stating the facts*). The deed set forth in the complaint undoubtedly granted to the city an easement over the lands described in the deed for the purposes set forth therein. It was an easement in gross, because it does not appear to be appurtenant to any estate in land, and it was upon condition. Whether the condition was precedent or subsequent is not necessary to be decided upon this appeal, and is not decided. The easement was also in perpetuity. That an easement may be created in fee is well settled. The fee of land may be in one person, and the fee of an easement upon such land in another,

2 Bl. Comm., c. 7, pp. 106, 107; Story *v.* Railroad Co., 90 N. Y. 122, 158; Child *v.* Chappell, 9 N. Y. 255; Nellis *v.* Munson, 108 N. Y. 453; 15 N. E. Rep. 739. Technically, an easement in fee must be appurtenant to land; and consequently, the easement here created, being in gross, is not strictly an easement in fee, but, being granted to the city, "its successors and assigns," it is capable of assignment, and is therefore undoubtedly in perpetuity, though not technically in fee. Poull *v.* Mockley, 33 Wis. 482. The difference is purely technical, and does not affect any substantial right in this case. Therefore, when this deed was executed and delivered, the fee of the land remained in the grantors, Mead and Bolles, subject to the conditional easement in perpetuity created by the deed. Being the owners in fee of the land, they could, of course, convey it to another; and their grantee would stand in their shoes. Why, then, cannot such grantee bring an action against one claiming an easement on condition to take advantage of condition broken or enforce its performance? It is said that he cannot because of the long-settled common-law principle that a condition in a deed can only be reserved to the grantor or his heirs, and not to a stranger. This rule applies to land conveyed upon condition subsequent, and the reason of the rule is that the estate is not defeated, though the condition be broken, until entry by the grantor or his heirs, and there is nothing to assign save a mere right of entry, which at common law is not assignable. Nicoll *v.* Railroad Co., 12 Barb. 460; 12 N. Y. 21; 1 Greenl. Cruise, tit. 13, c. 1, § 15. No such rule can apply here, because the reason does not exist. In this case the plaintiff does not claim as the assignee of a mere right of action or right of entry on land, but he claims as owner in fee of land burdened with an easement granted upon condition, which condition is alleged to have been broken. It would be a singular rule of law which would forever prevent the owner in fee of lands from questioning the right of another to maintain an easement upon his land, when there existed a violation of the express condition upon which the easement was granted. No such rule exists.

It is claimed by the appellant that the condition in the deed that the city shall build a highway is void, because it appears that the building of such highway would involve an expense of some $8,000, and the complaint does not allege that any action was ever taken by the common council of the defendant city agreeing to the condition, or promising to perform it, and the city charter containing a provision that no debt shall be created or liability incurred by the city except by a vote of a majority of the members of the council. Hence

it is argued that the condition in the deed was and is void, and that the title to the easement vested in the city without performance of the condition. In reference to this and kindred objections, it is sufficient to say that the complaint alleges substantially that the city made and entered into this agreement and purchased and received the deed of the property in issue upon the terms, conditions, and reservations expressed in the deed. Upon demurrer this must be construed as meaning that such steps were taken as were legally necessary to make the conditions of the deed effectual.

It is further objected by the appellant that an action in equity will not lie, because the plaintiff has an adequate remedy at law by an action in ejectment. Neither is this objection well taken. Ejectment is not the appropriate remedy for the recovery of a mere easement. Child *v.* Chappell, 9 N. Y. 246; Strong *v.* Brooklyn, 68 N. Y. 10; Washb. Easem. (4th Ed.), p. 740. In this connection, see also, City of Racine *v.* Crotsenberg, 61 Wis. 481; 21 N. W. Rep. 520. It is true that in Lawe *v.* City of Kaukauna, 70 Wis. 306; 35 N. W. Rep. 561, ejectment was maintained against a city for property which was claimed by the city as a highway or approach to a bridge. The case shows, however, that permanent walls and abutments had been built upon the property, and that the bridge, when closed, rested partially thereon, so that it was in fact permanently occupied. Furthermore, no objection was taken in that case that the proper remedy was in equity. That question was not raised, and hence not decided. The case is not authority against the doctrine that the proper remedy here is in equity.

The claim that the complaint shows adverse possession by defendant for more than 10 years is not tenable. It simply shows such possession as is necessary to the full enjoyment of the easement. Such possession is not adverse to the owner of the land. The character of the possession is determined by the character of the claim under which possession is taken and held. The claim is only of an easement.

The objection that the complaint improperly joins two causes of action — one for damages at law, and one for equitable relief — cannot prevail. It being settled that equity has jurisdiction to entertain the action for the purposes of determining the rights of the parties with regard to the easement, it will, on familiar principles, take cognizance of the controversy in all its branches, and settle the rights of the parties by a single decree, thus saving multiplicity of suits. Turner *v.* Pierce, 34 Wis. 658.

It is said that the claim for money damages is barred by a provision of the charter of the defendant city which was in

force prior to passage of chapter 184 of the Laws of 1889, as follows: "No action shall be maintained by any person against the city of Eau Claire upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and allowance thereof refused by said council." What effect this provision may have upon the claim for damages is not necessary to be determined. It plainly is inapplicable to an action for equitable relief, and hence cannot serve as ground for demurrer to the entire complaint.

The revised charter of the city (chapter 184, Laws 1889) also contains the following provisions, which are relied upon to defeat this action: "Sec. 22. No suit of any kind, or any claim or cause of action, either *ex contractu* or *ex delicto*, shall be brought against said city, but the claimant shall file his claim with the city clerk, for the action of the common council thereon; and, if he feels aggrieved by their determination, he may appeal to the circuit court, in the manner hereinafter provided. If the council neglects to take final action, within sixty days after the same is filed, the same, for the purposes of an appeal by the claimant, may be taken as disallowed. In case an appeal is taken, the city clerk shall immediately notify the city attorney, and shall make and deliver to him a copy of all papers and proceedings relating to the matter in his possession. He shall notify the common council of such appeal at its next meeting; and no appeal shall be taken, entertained or allowed, from the determination of such council, unless the cause of action accrued within six months immediately prior to the time when such claimant shall have filed his said claim with the clerk as aforesaid. Sec. 23. The determination of the common council, disallowing in whole or in part any claim or causes of action of any person, company, or corporation shall be final and conclusive, and a perpetual bar to any action in any court founded on such claim, unless such person, persons, company, or corporation shall appeal from such action disallowing the same to the circuit court as provided in this chapter." These provisions if applicable to such an action as this, would, by their terms, absolutely bar this action immediately upon the passage of the act, because the cause of action accrued more than six months before the claim could be filed with the city clerk; hence no appeal could be taken from a disallowance by the council, and that determination would be final and conclusive. Thus the right of action is absolutely cut off at once, and without giving any time to prosecute. This cannot be done, under well established principles. Arimond *v.* Canal Co., 31 Wis. 316.

The final objection taken is that this action is barred by the statute of limitations. Rev. St., par. 4, § 4221. The deed was given in January, 1877. By its express provisions the city had five years in which to complete the canal and highway, so that it would seem that the cause of action did not accrue until January, 1882, which is less than 10 years before the commencement of this action, and consequently the action is not barred by the statute last named, which fixes the period at ten years.

It is unnecessary to discuss the question as to what precise form of relief the plaintiff will be entitled to if he substantiates his complaint upon the trial. He may not be entitled to all that he has prayed in his complaint, nor perhaps in that form, but that he will be entitled to some remedy we cannot doubt. Order affirmed.

Easement by Prescription — Equitable Easement.

Tredwell *v.* Inslee, 120 N. Y. 458; 24 N. E. 651.

Appeal from an order of the general term of the third judicial department, which reversed a judgment entered upon the decision of the special term, and granted a new trial.

This action was brought by the plaintiff's testator to restrain the defendant's testator from interfering with a drain running from the plaintiff's premises across the defendant's premises, and to compel him (defendant's testator) to restore the portion of the drain which he had destroyed. Prior to October 14, 1845, Platt Williams was the owner of four lots of land on Patroon street, now Clinton avenue, in the city of Albany, and of nd adjoining said lots on the south, and fronting on Orange street. On the date last named, said Williams and wife conveyed to one Davidson the lot owned by the defendant, and thereafter said lot, by several mesne conveyances, was conveyed to John Reid, the defendant's testator. Said Reid became the owner in May, 1873. None of said deeds contained any reservation of the use of any drain, or of any right or privilege of drainage, through or across said lot. The deed to Davidson did, however, convey the right to "the use of a drain in the rear of said premises, leading from thence through another lot of said party of the first part (Williams) to a public drain in Orange street," and said right of drainage was by several mesne conveyances of said lot conveyed to said Reid. On November 20, 1849, said Williams and wife conveyed to one Charles C. Vail two plots of ground on Patroon street, one lying easterly and one westerly of the lot conveyed to Davidson, the latter of which two plots of

land included the lot now owned by the plaintiff. The deed to Vail made no mention of any right of drainage, or of any right to use any drain through or across the defendant's lot. On December 2, 1851, said Vail conveyed the lot now owned by the plaintiff to one William Rennie, and by several mesne conveyances the title thereto was, prior to September 4, 1860, vested in James Vane, who, on said date, conveyed the same to plaintiff's testator. The deed from Vail to Rennie purported to convey "the free and uninterrupted use of a drain in common with the other owners," and such right is expressed as being conveyed, in all subsequent deeds of the lot, to and including the deed from Vane to the plaintiff's testator. When plaintiff's testator became the owner of said lot there existed a drain which ran therefrom across an intervening lot, and across the defendant's lot, to the lot of one George Carroll, which is next east of defendant, and then entered a drain running southerly across a lot owned by one Flood to Orange street, which then and for some time thereafter was used to drain the plaintiff's lot. In May, 1885, the said drain was discovered by plaintiff's testator to have been cut off and stopped up with clay, upon defendant's lot. Flood derived the title to his lot from Williams, and the conveyance to him in October, 1853, was "subject to a certain right of drainage or sewerage from four certain lots heretofore sold, and conveyed by party of the first part (Williams), and lying on Patroon street, through a drain or sewer heretofore constructed in and upon said lot hereby conveyed, and this right is hereby reserved; the party of the second part, his heirs and assigns, being hereby bound to keep in repair that part of said drain or sewer, as it now exists, which runs through the lot hereby conveyed." The trial court found that, by the deed from Vane and wife, the plaintiff's testator became the owner of a right of drainage across the defendant's lot, and thence across the lot on the east, to a drain running southerly to Orange street; that the defendant's testator held his lot subject to such right of drainage, and became the owner of said lot, with due notice of said right; that the plaintiff had, prior to May, 1885, used and enjoyed said right of drainage for more than 20 years; that the drain from plaintiff's lot through defendant's lot, and thence to Orange street, was the one referred to in the deed from Williams to Davidson; and that defendant and his grantors were made acquainted with the condition of the lots in reference to the drain by the deed of Williams to Davidson, and took title with notice and knowledge of the changed condition of the lots as related to the drain. Further facts appear in the opinion.

BROWN, J. (*after stating the facts as above*). The finding of the special term that the plaintiff's testator became the owner of a right of drainage across the defendant's lot by the deed from Vane and wife cannot be sustained. The earliest conveyance by Williams of any of the property affected by the drain in question was of defendant's lot to Davidson, in 1845. That conveyance contained no reservation of the use of any drain for the benefit of the lots lying west of it, and it cut off all such right from any lots subsequently conveyed by Williams. Williams continued to own the plaintiff's lot until November, 1849, and his conveyance of that lot in that month to Vail did not purport to convey any right to the use of the drain. Whether or not the drain existed at that time does not appear in the evidence, and is not important or material, in view of the fact that the right to use it was neither reserved in the deed to Davidson nor conveyed in the deed to Vail. The earliest mention of a drain in connection with plaintiff's property is in the deed from Vail to Rennie, in 1851. That deed did not locate it or describe it as running across defendant's lot. The right to use such was conveyed to Vane, and he conveyed it to the plaintiff's testator in 1860. No deed from any owner of defendant's lot prior to 1860 is proven, conveying any such right, and it is apparent at that date no title by user could have been acquired by the owner of plaintiff's lot. The finding quoted, therefore, appears to be without any evidence to sustain it. The right to the use of the drain for the benefit of the plaintiff's lot (if such can be sustained) does not rest upon a conveyance thereof, but upon a title obtained by a use adverse to the defendant. The special term found as a fact that prior to May, 1885, when the plaintiff's testator first discovered that the drain was cut off, he had used and enjoyed such right of drainage for more than twenty years under claim of right. If that finding can be sustained, it is not disputed that the judgment of the special term was right, and the only question necessary to be considered upon this appeal is whether such finding has evidence to support it. The conveyance to Munsion, plaintiff's testator, was in September, 1860. He testified that he first knew of the drain when he took possession of the property; that it commenced at his house, ran southerly to the rear of the lot, thence easterly across the defendant's lot to the lot of George Carrol, where it entered the sewer, leading southerly to Orange street. That is the earliest date at which the evidence fixes the existence of the drain across defendant's lot, and there is no evidence that at that time its existence was known to the owner of that lot. John Reid, defendant's testa-

tor, purchased the lot in May, 1873. Munsion testified that in 1875 he paid five dollars to John Reid's brother, for repairing the common sewer running across Flood's lot to Orange street; and assuming that John Reid was cognizant of that payment and that it permits an inference that he must then have known that the drain from plaintiff's lot to the common sewer crossed his property, that is the earliest date at which the evidence charges him with knowledge of the fact.

These facts do not establish an adverse user. To establish an easement in the land of another by prescription or adverse use, it is essential that the use and claim of right be actually known by the person against whom the adverse user is claimed, or it must be so visible, open, or notorious as that knowledge of such use or claim will be presumed. Ward *v.* Warren, 82 N. Y. 265; Parker *v.* Foote, 19 Wend. 309–311; Nicholls *v.* Wentworth, 100 N. Y. 455; 3 N. E. Rep. 482; Washb. Easem. (3d Ed.) 160; Hannefin *v.* Blake, 102 Mass. 297. An underground drain is not visible or apparent to an owner of property, and the adverse user did not begin to run until it was brought to the notice of the defendant's testator, in 1875, and it is apparent that at the time of the commencement of this action such user had not ripened into a title. Nor can the right of drainage be sustained upon any claim that the drain existed at the time of the deed to Davidson. If Williams had constructed this drain for the benefit of all the lots on Patroon street, the right, so far as it related to the lots west of defendant's lot, was lost upon the conveyance to Davidson. As already stated, the drain was not an apparent or visible incumbrance, and, in the absence of actual knowledge of its existence, Davidson had a right to rely upon appearances, and to believe that the apparent condition was the real one. In such a case as this, the grantee takes his land according to the terms of his deed, and, if the deed gives no notice of any right reserved in favor of the grantor across the lot conveyed, the latter is freed from any servitude theretofore existing, and the grantor is estopped by his covenants from asserting any. Butterworth *v.* Crawford, 46 N. Y. 349; Huyck *v.* Andrews, 113 N. Y. 81; 20 N. E. Rep. 581.

The appellant's claim that the owner of defendant's lot is chargeable by the record with constructive notice of the existence of the drain from the date of the deed to Davidson cannot be sustained. The deed to Davidson gave no notice that the lot thereby conveyed was burdened with a servitude in favor of any lots of Williams on the west. It conveyed the right to the use of a drain across the grantor's lot on the east, leading to the

common sewer to Orange street. This was beneficial to the lot conveyed. But there was no intimation that lots on the west were to enjoy a similar benefit, or that Davidson's lot was burdened with a right of drainage, in their favor. None of the subsequent deeds for this lot recognized any servitude in favor of plaintiff's lot. The fact that the deed to Davidson was not recorded until May, 1873, long after the record of the deed from Williams to Vail, is not a material fact in the record. If the deed to Vail had conveyed a right of drainage across Davidson's lot, the failure to record the Davidson deed might have been important. But, as already pointed out, this deed did not purport to grant or convey any right of drainage. It is only when two conveyances purport to convey the same property that a subsequent purchaser obtains a priority over an earlier grantee by reason of priority of the record of his deed. Neither was the defendant or his grantor chargeable with notice of the contents of the Flood deed. The conveyance was subsequent to both the deeds to Davidson and Vail. It did not appear in the chain of title to either lot; and, if it did, I fail to see how the fact that Flood's lot was burdened with the right of drainage in favor of all the lots on Patroon street could alter the rights which the owner of the defendant's lot acquired under the deed to Davidson. The order must be affirmed and judgment absolute rendered for the respondent, with costs. All concur.

Equitable Easement — Title to Alley by Estoppel.

Cihak *v.* Kleke, 117 Ill. 643; 7 N. E. 111.

Error to First district.

SHELDON, J. We are of opinion that, upon the facts of this case, Cihak, the plaintiff in error, has an easement in the alley in question, which cannot be destroyed without his concurrence. We would have no doubt in the matter had Mrs. Hubbard, the grantor of Cihak, been the actor in the sale to him, and in the previous management of the entire property instead of Gunzenhauser. The proof establishes to our satisfaction that in 1859 Gunzenhauser, as agent, took charge of the three lots 19, 20, and 21, fronting on De Koven street, to care for, lease them, and collect the rents; that for the more advantageous leasing of the lots, and deriving the most rental, he subdivided them, making of lots 20 and 21, four lots fronting on Jefferson street and dividing lot 19 into two lots fronting on De Koven street. He made the four lots on Jefferson street 90 feet in depth, and an alley 10 feet wide, — the alley running from north to south along

the entire east line of lot 19, and taking off the west 10 feet of the east two lots, thus forming an alley between the east half of lot 19 on the west, and the four lots on the east; that he drove the stakes for the alley; that he made written leases of the lots, according to this subdivision, leasing the four lots as only ninety feet deep; that in 1859 he leased the east half of lot 19, and the tenant in that year put up a fence on the west line of the alley, and, as the four lots east of the alley were leased, the tenant would put a fence on the west end of his lot adjoining the alley, so that by about 1864 all the four lots east of the alley were leased and occupied, and there was either a fence or shed and barn along the entire east line of the alley; and from that time until 1882, with the alley thus opened and defined, all the lots were under lease in the manner stated. This establishment of the alley was not only for the use and benefit of the lots from which it was taken on the east of it, but it was as well for the use and benefit of the east half of lot 19, which adjoined its whole length on the west. This alley was a manifest advantage to the east half of lot 19, and must have enhanced its rental value. There was a building on the east half of lot 19 fronting on De Koven street, with its side on the line of the alley, with a window in it, and a door leading into the alley. The alley was actually being used for the delivery of coal and wood for the house, and was the only means of access used for such purpose. If all this had been with the knowledge and procurement of the owner, and she had personally sold the east half of lot 19, the case would seem to be brought within the principle that when the owner of two tenements, or of an entire estate, has arranged and adapted these so that one tenement, or one portion of the estate, derives a benefit and advantage from the other, of a permanent, open, and visible character, and he sells the same, a purchaser takes the tenement or portion sold with all the benefits and burdens which so appear, at the time of the sale, to belong to it. Morrison *v.* King, 62 Ill. 34; Ingals *v.* Plamondon, 75 Ill. 118; James *v.* Jenkins, 34 Md. 1; Huttemeier *v.* Albro, 18 N. Y. 50; Lampman *v.* Milks, 21 N. Y. 507; Dunklee *v.* Wilton R. Co., 24 N. H. 489; Kieffer *v.* Imhoff, 26 Pa. St. 438; Cannon *v.* Boyd, 73 Pa. St. 179.

We do not concur in the view of counsel for defendants in error, that the easement to be claimed by the grantee in such a case must be really necessary for the enjoyment of the estate granted. Mr. Bennett, in his edition of Goddard on Easements (page 122), in speaking on this subject of grants of *quasi*-easements upon the conveyance of one of two lots, says: —

"The third class of cases is where the *quasi*-easement claimed

by the grantee is not really 'necessary' for the enjoyment of the estate granted, but is highly convenient and beneficial therefor; and here the modern rule in America is that, if such easement is continuous and apparent at the time of the grant, it passes to the purchaser with his estate, otherwise not."

And in Washb. Easem. (3d. Ed.) 95, in the discussing of this question, the author says: —

"It (the easement) must be reasonably necessary to the enjoyment of the part which claims it; and, where that is not the case, it requires descriptive words of grant or reservation in the deed to create an easement in favor of one part of a heritage over another."

There can be no doubt here that the alley was highly convenient and beneficial for the enjoyment of the estate granted to Cihak. Gunzenhauser would appear to have made the subdivision he did of his own motion. Wilder was the owner at the time, and lived in Chicago. All that goes to connect him with the subdivision is Gunzenhauser's statement that Wilder was on the ground several times; helped him to get off the squatters; "made no objection to my letting out the land in that way, and was perfectly satisfied." While Henry G. Hubbard owned the property, he lived in Connecticut, and is not shown to have had any personal knowledge of the subdivision; and the same with Mrs. E. K. Hubbard. We understand she, too, resided in Connecticut. E. K. Hubbard, her husband, testifies that he resided in Chicago from 1835 to 1885; that he had authority from his wife to act on her behalf; says he thinks his wife had seen the lots; that he saw them, after his wife became owner, perhaps once a month; that he did not recollect consulting with any one regarding the subdivision platted and recorded, except perhaps Gunzenhauser. And here the inquiry is suggested why this plat of the subdivision which was made and recorded at the instance of E. K. Hubbard, and, as Mrs. Hubbard acknowledges, by her direction, comes to correspond precisely with the subdivision which Gunzenhauser made in 1859, and has the same alley of just ten feet wide, exactly as Gunzenhauser staked out in 1859? It implies knowledge by Mrs. Hubbard of the subdivision, and is evidence tending to show her adoption and confirmation of that subdivision, and of what was done under it.

But without further pursuing this branch of the case, or expressing an opinion whether the circumstances of the arrangement and use of the alley for the accommodation of this lot of Cihak, and selling the lot with the apparent appurtenance of the alley attached to it, were alone sufficient to give to the grantee of

the lot the use of the alley, we come to the conclusion that they were sufficient when taken in connection with the subsequent sales being made subject to the alley. Defendants in error never bought or paid for the alley, or so supposed. In the deeds for lots 1 and 2 the use of the west 10 feet of the lots for a private alley was expressly reserved. And at the time the deed for lots 3 and 4 was made there was upon record the plat of the subdivision showing the alley upon it. True, it is named "Private Alley," and it is insisted by counsel for defendants in error that this means private to the lots from which the alley was taken, — those on the east side of it, — and that it was for their use only. Under other circumstances, of Mrs. Hubbard not being the owner of the ground on the west side of the alley, this might be so. But was it so under the circumstances here? The alley had originally been laid out many years before for the accommodation of Cihak's lot, as well as the other lots, and had ever afterwards been used equally for the accommodation of Cihak's and the other lots. At the time Mrs. Hubbard put the designation "Private Alley" on the plat the alley was being so used, and she was the owner of the ground on both sides of the alley, with a building standing on the west line of the alley constructed with special adaptation for the use of the alley. The alley was important for the beneficial enjoyment of her lot on the west side of the alley, and must have enhanced its value. There was no apparent purpose why the alley should not be as much for the use of the owner's ground on one side of the alley as on the other side. Under such circumstances, we think the meaning of "private" was that the alley was private to the owner's own ground; that the alley was for the use of the owner's lots only, but of her lots abutting on both sides of the alley, and not for the use solely of her lots on one side of the alley.

We give no consideration to the manifestly incompetent testimony of E. K. Hubbard, that his wife's intention was to reserve the alley as a private alley for the use of lots 1, 2, 3, and 4. It was not competent for him to swear to his wife's or any one else's intention. All that he might do in such regard would be to testify to acts and declarations as showing intention. The question here is, what others had reason to believe was the intention from the circumstances and the acts done.

The alley was an important consideration with Cihak when he purchased. An inspection of the abstract of title did not show the alley of record. This defect was brought to the attention of Gunzenhauser, and, to assure Cihak that he would get with his lot the use of the alley, the plat of the subdivision, with the alley

appearing upon it acknowledged by Mrs. Hubbard, was shown by Gunzenhauser to Cihak; the former stating that the plat was going to be put upon record. This satisfied Cihak that he would get the benefit of the alley. Gunzenhauser, who made the sale, Kaspar, who acted for Cihak, and Cihak, no doubt, all believed that the recording of the plat of the subdivision would secure for Cihak the use of the alley. It did not occur to either of them that the word "private" had any significance as excluding such use. To so construe that word would be to make it but a snare to entrap the one purchasing the lot on the west side of the alley. It would be to give to defendants in error ground which they never purchased, and to rob plaintiff in error of an alley, the use of which he had good reason to believe he purchased as an appurtenance to his lot. We find enough in the facts of this case to have put the defendants on inquiry, so as to have affected them with notice of the circumstances upon which we rest the right of the complainant to the use of this alley.

The judgment of the appellate court and the decree of the circuit court will be reversed, and the cause remanded to the circuit court for further proceedings in conformity with this opinion.

Scott, J. I do not concur in this opinion.

Abandonment — Right of Way — Maintenance of a Drain.

Stein *v.* Dahm, 96 Ala. 481; 11 So. 597.

Appeal from chancery court, Mobile County; W. H. Tayloe, Chancellor.

Action by Joseph Stein against John Dahm and another to reopen an alley formerly existing between the lots of the parties, and keep the drain running therein unobstructed by defendant. From a decree dismissing the bill, plaintiff appeals. Decree affirmed as to the alley; as to the drain, the injunction is reinstated and made perpetual.

STONE, C. J. It is assigned as error that the chancellor, after first granting relief to complainant, entertained defendant's petition and granted them a rehearing. The first decree was rendered in vacation under rule 80 of chancery practice (Code 1886, p. 825). The concluding clause of that rule is in the following language: "When the decree is rendered in vacation, either party may apply for a rehearing by the second day of the next ensuing term of said court." The application in this case was made "by the second day of the next ensuing term of said court," and the chancellor com-

mitted no reversible error in entertaining it. In fact, we cannot perceive on what ground such order, if applied for in time, could be reviewed in this court. Of course, rehearings are granted under that rule only when the chancellor is induced to change his mind, or comes to doubt the correctness of his first ruling. Once granted, however, the case is left without a decree, precisely as if none had ever been rendered. There is nothing in this assignment of error.

If the question were before us, we are not prepared to say we would hold the answer puts in issue the execution of the deed, Exhibit A, so as to cast on complainant the burden of proving its execution. The answer does not deny the execution of the deed. It only denies that Stein became the owner of the lot by virtue of the deed. There are many conceivable ways in which that denial could be made good, notwithstanding the due execution of the deed by Mr. and Mrs. Saucier. We need not suggest them.

Neither is there anything in the objection that after granting the rehearing the chancellor gave further time and authority for taking additional testimony. He granted that authority to each party. True, there are strong reasons why chancellors should exercise great caution in such conditions; but under our practice that is left to the sound discretion of the chancellor, and is not revisable. In the present case the question arose, not on the re-examination of witnesses, but on the examination of witnesses not previously examined. See Bonner *v.* Young, 68 Ala. 35; Harrell *v.* Mitchell, 61 Ala. 270.

John B. Toulme became the owner of two adjoining lots and houses in the city of Mobile, known as Nos. "143" and "145" on the south side of Dauphin street. Each lot fronted 30 feet on Dauphin street, and extended back from 120 to 130 feet. On each was a two-story brick store, and on the rear of the lots, extending across them, was a two-story brick warehouse or workshop, divided into two compartments, corresponding to the divisions of the stores in front. In the rear of each store was a kitchen, and between the stores in front, the warehouses in the rear, and the two kitchens on the sides was an open space, court or yard, which was common to both storehouses. We are not informed how the stores were covered — whether by one common or connected roof or by separate roofs; nor are we informed in what manner the second floors of the houses were constructed — whether they covered the entire area or only that part inclosed within the brick walls, to be presently described. Each store, at the time it was owned by Mr. Toulme, had brick walls entirely around it, but the side wall of No. 142,

next to 145, was bricked up only one story. What, if anything, was above that is not shown. Store No. 145 covered the entire lot, 30 feet wide, from the front extending as far back as the store extended, inclosed entirely within an outer brick wall. The lot 143 was not so covered. The house on it extended towards 145 some twenty-two feet, leaving a space or alley-way nearly or quite eight feet wide between the two stores. This extended, with the brick wall on either side, from end to end of the stores, and had double door shutters at each end. These were usually kept open in the daytime, and the alley was a common passway for persons going to and from the rear of either of the storehouses; and there was a common drain or sewer through this alley way, which conducted the accumulated water from the common back yard to the gutter in front of the stores. At the time we are speaking of, which was prior to 1860, one Werborn was tenant of the house 143 entire, and of all save the lower story of No. 145. He was an upholsterer, and kept a furniture store. In August, 1860, Mr. Toulme executed his last will, and soon afterwards died. The will was probated and established during that year. By his will he devised the two lots and storehouses separately to two of his married daughters, Madeline J. Saucier and Victoire Saucier. The husband of Madeline J. died, and by a second marriage she became Mrs. Breath. The devise to Madeline J. was No. 143, describing it as "measuring thirty feet front," being the east half of said lot of land. To this devise he added the following clause: "That part now devised hath thereon a two-story brick house with a kitchen, a two-story privy, and the half of a two-story warehouse in the yard, and the right of way through an alley or passage from Dauphin street to the yard in the rear of said property." Lot and house No. 145, "measuring thirty feet front on Dauphin street, and running back as the other," he devised to Victoire Saucier, and added as part of the devise "the right of way through the alley or passage from Dauphin street to the yard, as aforesaid." Soon after the death of Mr. Toulme, Werborn became the tenant by a long lease of each of said stores, occupying the upper story of 145 as a residence, and using the entire house 143, the warehouse or workshop, and the lower story of 145, in his business as an upholsterer and furniture merchant. He continued to so occupy the two properties under renewals of lease, until a very short time before the filing of this bill, August 1, 1890. Between 1860 and 1870 — probably about 1866 — a very material alteration was made in the store No. 143 and the alley-way, and in the connection of the two houses. That alteration was made at the request of Mr.

Werborn, and under his direction, but with the consent and at the expense of the owners of the property, the two devisees under Mr. Toulme's will. It consisted, so far as is material to this suit, in the following: The entire brick wall of No. 143, which adjoined the alley-way, was taken down, and iron supporting columns were substituted in its stead; and the floor was extended entirely across the alley-way, and to the wall of 145. In this way that floor and the store room were made to cover the entire thirty feet. The front door of the alley was removed, and the entire space filled and closed with a costly show window and towards the rear of what had been the alley-way a broad staircase was constructed from the first to the second floor — this for the purpose of reaching the second story of 143. The two stores remained in this condition when this bill was filed, except that two or three years before that time a plank wall or partition, extending from column to column, had been erected on the line of the removed brick wall of No. 143. It is not shown, however, that the sewer or waste escape from the back yard to the front, through the alley-way, had never been obstructed. It is supposed it had never been left to flow under the floor of the closed alley-way. In February, 1876, Victoire Saucier and her husband sold and conveyed her house and lot, 145 Dauphin street, to Joseph Stein. The deed contains the usual full covenants of warranty. It describes the property sold as a lot fronting 30 feet, bounded on the east by property of Mrs. Breath. It gives no expression of the easement or right of way claimed, but conveys the property, "together with the tenements, hereditaments, rights, members, privileges, and appurtenances." After the execution of that deed, Stein became the landlord of Werborn of the property so conveyed, and so continued until the latter ceased to occupy it, November 1, 1889. In June, 1879, Madeline J. Breath and her husband sold and conveyed to John Dahm storehouse and lot No. 143 Dauphin street. Like the other deed, it describes and conveys the lot as fronting 30 feet on Dauphin street, and gives as its western boundary the lot sold and conveyed by Victoire Saucier and her husband to Stein; conveys with full covenants of warranty, "together with the tenements, hereditaments, rights, members, privileges, and appurtenances." It makes no mention of the alley-way, or of any easement therein, but does refer to the will of her father as the source of her title. From this time forth Dahm became the landlord of Werborn of the property so purchased, and so continued as long as the latter occupied the store. The present bill was filed by Stein, and seeks to reopen the alley, and to

establish his common right to it as a way of ingress and egress to and from the rear of his property. He also seeks to establish his right to have the sewer or waste way through the alley kept open and unobstructed. On the second hearing the chancellor dismissed the bill.

There can be no question that when the two sisters became the separate owners of the separate lots and stores there attached to 145 the right of way and easement in the alley-way as it then stood, which is claimed in the present suit. Mr. Toulme's will clearly proves that. Of this easement, 143 was the servient, and 145 the dominant, estate. Has that right been surrendered or lost? The two sisters, Mrs. Saucier and Mrs. Breath, were examined as witnesses. Each testified that the alterations and improvements closing up the alley-way were made in 1865 or 1866; that they were made at the request of Werborn, but with their knowledge and consent, and at their expense. Mrs. Breath testified that Mrs. Saucier gave her consent at the time that the alley should be closed up, and each testified that its use as a passageway was then and there entirely and forever abandoned. This Mrs. Saucier testified to as a fact. She also testified that it was her intention at the time to surrender and abandon all claim to the alley as a passageway, but this, being objected to, was illegal evidence. Uncommunicated intention cannot, under our rulings, be made the subject of direct proof. Ball *v.* Farley, 81 Ala. 288; 1 South. Rep. 253; Burks *v.* Bragg, 89 Ala. 204; 7 South. Rep. 156; Railway Co. *v.* Davis, 91 Ala. 615; 8 South. Rep. 349. The fact of consentive closing up of the alley, and the fact of abandonment, were competent proof. This, according to the testimony, was done about 10 years before Stein purchased, and about 13 years before Mrs. Breath sold to Dahm. It was more than 20 years before this suit was brought, and before any complaint is shown to have been made by Stein. That great jurist, Chief Justice Shaw, in Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 401, said: "If the owner of the dominant grants a license to the owner of the servient tenement to erect a wall which necessarily obstructs the enjoyment of the easement, and it is erected accordingly, it may amount to proof of an abandonment of the easement. It is not a release, because it is by parol. But it results from the consideration that a license, when executed, is not revocable; and if the obstruction be permanent in its nature, it does *de facto* terminate the enjoyment of the easement." In Pope *v.* Devereux, 5 Gray, 409, this principle was declared: "Evidence of an executed oral agreement between the owners of the dominant and servient tenements to discontinue an old way, and substitute a different

one, is competent evidence of the surrender of the old right of way." And in Ballard *v.* Butler, 30 Me. 94, is this language: "When the person to whom a servitude is due does an act which is incompatible with the nature and exercise of it, the servitude is thereby extinguished." It is said in 2 Washb. Real Prop. *57: "There are many acts of abandonment, short of a nonuser for twenty years, which if done by the owner of the dominant tenement, and acquiesced in by that of the servient, may amount to a surrender of such an easement, provided such acts of abandonment have been done with such intention." In 6 Amer. & Eng. Enc. Law, 147, is this language: "Abandonment will be presumed from various acts of the dominant owner; as, for example, where the holder of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right." See, also, notes, 3 Kent Comm. *448, *449; King *v.* Murphy, 140 Mass. 254; 4 N. E. Rep. 566; Corning *v.* Gould, 16 Wend. 531. In 2 Wait Act. & Def. 680, it is said: "A use which had been abandoned or disused at the time of the sale would not come within the conditions above given [transfer of the easement by a sale and conveyance of the dominant estate], and a right which did not then legally exist, although it might have had a previous existence, would not be revived without express words." If it be objected that the removal of the door shutters and substitution of the show window, the extension of the floor of 143 across the alley-way, and the construction of the stairway in what had been the alley, were none of them of a permanent character, but all might be restored to their former condition, and at trifling expense without injury to the properties, what will be said of the removed brick wall which separated the store No. 143 from the alley-way? All the alterations were made at one and the same time, and with the knowledge and consent of both landlords, and at their expense. All were made in execution of a common design and purpose. Can it be supposed that the mutual consent would have been given, and the necessary expense shared in, if at the end of a term original conditions were to be re-established, and store 143 left without a wall to separate and protect it from the open alley? We hold that the testimony very fully proves that the right of way through the alley, which pertained originally to the lot and store 145, was surrendered and abandoned when the alterations were made in 1865 or 1866. This was long before the present owners, Stein and Dahm, had any interest in or claim to the several properties; and consequently Stein, by his purchase, acquired no right to use the alley as a passway to and from the rear of his property. We think, however, that the

sewer or waste way which runs through or under the alley, and drains the common back yard, rests on a different principle. It is not proved that it has ever been obstructed or discontinued. We infer from the circumstances that it flows under the floor which was extended from 143 across the alley. This being the case, the record fails to show an abandonment of this part of the easement, and it follows that this right still pertains to 145. So far as the right of ingress and egress through the alley-way is concerned, the decree of the chancellor is affirmed.

The bill charges that defendant Dahm claims the right to close the sewer through and under what was formerly the alley, and that he intends and threatens to close that drain or outlet against complainant. The answer admits this charge to be true. We hold that complainant is entitled to an injunction on this feature of the case made by his bill. It is therefore ordered and decreed that the decree of the chancellor be to that extent reversed, and this court, proceeding to render the decree the chancellor should have rendered, doth order and decree that the injuction, so far as it restrained the closing of the sewer or drain, be reinstated and made perpetual. Let the complainant, Stein, pay three-fourths of the costs of the original suit and one third of the costs of appeal; and the remaining costs — that is, one-fourth of the costs of the original suit and two-thirds of the costs of the appeal, alike in the court below and in this court — are adjudged against Dahm, the appellee. Reversed and rendered.

When Non-User Will Extinguish an Easement.

Edgerton *v.* McMullan, 55 Kan. 90; 39 P. 1021.

Opinion by ALLEN, J.

This was an action of trespass brought to test the title of the defendants below (plaintiffs in error in this court) to a right of way over a certain strip of land described in the petition. The case was tried before a judge *pro tem.* It was admitted at the trial that the land was conveyed by patent from the United States to Harriet W. P. McMullan, that the plaintiffs were her sole heirs, and that the defendant, under a claim of right, as president of the Wyandotte Town-Site & Improvement Company, went upon the strip of land in question, and cut down trees for the purpose of opening up said strip of land as a road. The plaintiffs introduced a deed from Henry M. McMullan and Harriet W. P. McMullan to Mary A. Mather, dated September 6, 1860, conveying a four-acre tract of land therein described, " with the privilege of a road two poles wide on the north and east

lines of the above-described premises." The defendants offered in evidence a deed dated August 16, 1882, from Samuel F. Mather and Mary A. Mather to B. D. Hoag, trustee. It was admitted that Hoag was trustee for the Wyandotte Town-Site & Improvement Company, to which he afterwards conveyed the property. There was evidence showing that there had been public travel along a part of the land in dispute for a time; that a hedge fence was put out near the north line of the land conveyed to Mrs. Mather, 30 feet from the north line of the McMullan allotment, about 25 years before the trial of the action. The strip was open at the end until about two years before the commencement of the action, when it was fenced up by the plaintiffs below. The land had not been occupied for any purpose, but allowed to grow up in trees. The court made the following special findings of fact and conclusions of law: —

"(1) That prior to the 6th day of September, 1860, Harriet W. P. McMullan was the owner of the land in controversy, in fee simple. (2) That on said date she sold to Mary A. Mather lands adjoining the lands in controversy, and with the privilege of a road two poles wide over and along the land in controversy; that about the year 1869 or 1870 the said Mary A. Mather fenced in her land, building along the south line of the land in controversy, and the north line of the land that she purchased from the said Harriet W. P. McMullan, an osage orange hedge; that at or about that time there was a fence upon the north line of the land in controversy, and upon the east and west ends thereof; that from that time up to the time the plaintiffs built the fence around the land that is hereinafter mentioned, said land was not used as a road, but was allowed to grow up with bushes and trees. (3) I further find, as a matter of fact, that said Mary A. Mather never claimed any interest in said land; that when she planted said hedge she abandoned and gave up any right that she had in the easement granted by said deed. (4) That the said Harriet W. P. McMullan is dead, and that the plaintiffs are her sole and only heirs. (5) That, some time during the year 1886, plaintiffs built a valuable fence upon both sides and both ends of said land in controversy; that the defendants tore down and destroyed said fence, and cut trees thereon; that the damage so done was one dollar.

"Conclusions of law: I find, as a conclusion of law, that plaintiffs are entitled to recover herein, in the sum and amount of one dollar, together with their costs."

Thereupon the court rendered judgment in favor of the plaintiffs for one dollar. The certificate of the judge who settled the case states that the action involves the title to real estate.

The trial court held that the evidence showed an abandonment by Mrs. Mather of her right to an easement over this land. The only evidence to support that claim is that showing that she placed a hedge fence along the north line of the land conveyed to her in fee simple, which was the south line of the tract in controversy, thus excluding from her inclosure the strip two poles wide, or nearly that amount, and that she never actually used the land for a road. The evidence of Dr. Mather, her husband, shows that she had no use for the roadway, but contemplated laying the land out into lots at some time. The law is well settled that mere nonuser of a right of way granted by deed does not constitute an abandonment of the right. In Washb. Easem., p. 717, the author says: "If the easement has been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. Nothing short of a use, by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time long enough to create a prescriptive right, will destroy the right granted." So in Day *v.* Walden, 46 Mich. 575; 10 N. W. 26, Judge Cooley, delivering the opinion of the court, says: "The right to the easement was not lost by the mere neglect to assert, use, and enjoy it for the period of twenty years. There is no doubt of this, upon the authorities. The easement was created by grant, as an appurtenance to the mill; and there were no conditions or limitations attached which rendered its use necessary to its continuance. The grant was perpetual, and without conditions, and therefore the privilege granted would continue indefinitely, whether the grantee did or did not avail himself of it. An accepted grant cannot be waived or abandoned, and the neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant." To the same effect are Riehle *v.* Heulings, 38 N. J. Eq. 20; Lindeman *v.* Lindsey, 69 Pa. St. 93. There is no evidence in the record of any act of the plaintiffs inconsistent with the right of the defendants and their grantors until the strip was fenced up at the end. Even this could hardly be said to amount to such a hostile assertion of right adverse to the defendants as would set the statute of limitations running against their deed. The defendants neither had nor claimed to have, by virtue of the deed to Mrs. Mather, the full title to the land. They were under no obligation to use the easement until they desired to do so, nor were they bound to take any action to protect their rights so long as there was no occupancy of the land inconsistent with them.

While the deed from Mrs. Mather to Hoag does not specifically mention the right of way, it grants the land and appurtenances thereto. There is no question that this easement was appurtenant to the land, and passed to the grantee of Mrs. Mather. The judgment is reversed, with direction to enter judgment, on the special findings and undisputed facts of the case, in favor of the defendants. All the justices concurring.

Rights of Mill Owners in Stream of Water.

Phillips *v.* Sherman, 64 Me. 171.

Appleton, C. J. The defendant is the owner of a grist mill and privilege situate on a stream issuing from Hebron Pond in Monson. The evidence shows that in 1820 a dam and grist mill were erected at the outlet of said pond. In 1841 the then owner of the privilege rebuilt and enlarged the grist mill and deepened the channel thereto. Formerly fifty bushels of wheat and corn were daily ground at this mill. More recently the number has been reduced to a daily average of about twenty bushels. The consequence is that a much less quantity of water is now vented than formerly.

The plaintiff's mill and dam situated some distance below, on the same stream, was built in 1844. The defendant's privilege and dam have been occupied and enjoyed by him and those under whom he derives his title for a much longer period than is necessary to acquire an adverse title by prescription. Without detailing the evidence we think it is satisfactorily proved that the defendant has all the rights which prior occupancy can give as well as those which can be acquired by prescription, so far as regards the height of his dam.

The defendant then has a right to keep and maintain his dam at its present height with all water necessary to propel his machinery. But of this the plaintiff makes no complaint. The defendant claims the right to retain water not needed in any way for the use of his mill, nor necessary for its full enjoyment, and to the loss and injury of those whose mills are below him on the same stream.

The defendant owning the privilege above, and being the first occupant upon the stream, has a prior right to all the water necessary to propel his machinery. But while this right is sustained and protected he must use the water in a reasonable and proper manner, having regard to the like reasonable use by all the proprietors above and below. He cannot unnecessarily, and at his own will and pleasure, detain the water an unreasonable length

of time, nor discharge it in such excessive quantity that it would endanger those below. Every owner of mills above is required so to use the water that every riparian proprietor below shall have the enjoyment of it substantially, according to its natural flow, but subject to the necessary and unavoidable interruption arising from its reasonable and proper use by the privilege above. It cannot be unnecessarily and wantonly detained. Each riparian proprietor on a running stream, whether above or below, has a right to the reasonable use and enjoyment of the water, and to the natural flow of the stream, subject to such disturbance and the consequent inconvenience and annoyance as might result to him from a reasonable use of the waters by others. The owner of a mill and dam has a right to the reasonable use of the water, but he must detain it no longer than is necessary for its profitable enjoyment, and then return it to its natural channel. A wanton or vexatious or unnecessary detention would render the mill-owner so detaining liable in damages to those injured by such unlawful detention. Hetrich *v.* Deachler, 6 Barr. 32; Davis *v.* Winslow, 51 Maine, 264; Davis *v.* Getchell, 50 Maine, 602. In all these cases the question is whether or not the use has been reasonable. Thurber *v.* Martin, 2 Gray, 396; Pool *v.* Lewis, 5 American Rep. (41 Ga. 162) 526; Holden *v.* Lake Co., 43 N. H. 654; Washb. on Easements, 268; Springfield *v.* Harris, 4 Allen, 496.

So far as the defendant or those under whom he derives his title have by artificial means improved the stream, those improvements inure to the benefit of those below. The result is that the defendant has a right to use the water in his pond for the running of all the machinery upon his dam. Has a right to detain it when required for the reasonable use of his mill. His rights are prior and superior to those of the plaintiff. But he cannot be permitted, in mere wantonness, to detain water not to be used, and of which there is no need whatever in the running of his mill.

The question of reasonable use of the water is one of fact, to be determined by the jury. The parties have referred that question to the court. Upon the whole evidence we are of the opinion that the defendant has unreasonably withheld water, neither necessary nor required for the use of his mill. Accordingly there must be judgment for the plaintiff for $25 damages.

Conflicting Wells — Subterranean Currents — Pollution.

Collins *v.* Chartiers Val. Gas Co., 131 Pa. St. 143; 18 A. 1012.

Mitchell, J. The dividing line between the right to use one's own, and the duty not to injure another's, is one of great

nicety and importance, and frequently of difficulty. The Pennsylvania decisions have endeavored with unusual care to preserve the substance of both rights, as far as their sometimes inevitable conflicts may permit. With regard to the use and control of flowing water and of water-courses, the case of Coal Co. *v.* Sanderson, 113 Pa. St. 126; 6 Atl. Rep. 453; definitively settled the rule that for unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained. No other result seems possible, without restricting the uses, derogating from the full enjoyment, and diminishing the value of property. But the rule does not go beyond proper use and unavoidable damage. It is thus clearly expressed in the opinion of our Brother Clark: "Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*." 113 Pa. St. 146; 6 Atl. Rep. 457. That this is the rule as to surface streams was conceded by the defendants below; but they contended that as to subterranean waters, or at least as to percolations and hidden streams, an owner was not bound to pay any attention to the effect of his operations within his own land upon the land of others. The learned judge below, though seeing and expressing the force of the reasons for a uniform rule applicable to both classes of waters, felt himself so far constrained by adjudicated cases that he directed a verdict for the defendant. We have therefore to examine the cases to see what the true distinction is between surface, or visible, and subterranean waters, and whether different principles are applicable to the rights in them respectively, or the same principle, with only such modifications as may be necessary in practical application.

In Wheatley *v.* Baugh, 25 Pa. St. 528, the plaintiff had a spring upon his property, which he had used in his tannery for more than 21 years, when the defendant opened a mine on his adjacent land, and put in a steam-pump to take out the water, with the result of drying up the plaintiff's spring. It was held that plaintiff had no cause of action. This case settled the law on the subject of percolating waters, and has not since been questioned. It was followed in Haldeman *v.* Bruckhart, 45 Pa. St. 514, but was restated rather narrowly by Justice Strong, thus: "In that case it was ruled that where a spring depends for its supply upon filtrations or percolations of water through the land of an owner above, and, in the use of the land for mining or other lawful purposes, the spring is destroyed, such owner is not liable for the damages thus caused to the proprietors of the spring, unless

the injury was occasioned by malice or negligence. To such percolations or filtrations, then, the inferior owner has no right. This was all that was necessary to the decision of the case." He then criticises the rest of the opinion in Wheatley *v.* Baugh as *dictum*, and formulates the rule again in the following terms: "A proprietor of land may, in the proper use of his land for mining, quarrying, building, draining, or any other useful purpose, cut off or divert subterraneous water flows through it to the land of his neighbor, without any responsibility to that neighbor." These forcible statements of the rule are, as I apprehend, the main ground of the contention on behalf of the defendant in the present case, — that an owner is not bound to pay any regard to the effect of his operations on subterranean waters. But this contention overlooks the qualification made in all the cases, — that there must be no negligence. The opinion of Chief Justice Lewis in Wheatley *v.* Baugh, is as able, elaborate, and convincing a discussion of the subject as can be found reported, and in it the necessary and unavoidable character of the damage is implicitly insisted on: "When the filtrations are gathered into sufficient volume to have an appreciable value and to flow in a clearly-defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land." Page 532. "The owner of a spring, although his right is imperfect where the supply is derived through his neighbor's land has nevertheless a privilege subordinate only to the paramount rights of such neighbor; and it is only when the fair enjoyment of those paramount rights requires its destruction that he is bound to submit to the deprivation." Page 535. And even in Haldeman *v.* Bruckhart, which is the most strongly expressed of all the decisions in favor of the rights of the proprietor on his own land, it is clear that the same qualification is not lost sight of, although not prominently put forward. "A surface stream," says Strong, J., "cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterraneous percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself nor that other can have any knowledge. * * * These appear to us very sufficient reasons for distinguishing between surface and subterraneous streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoiner's land. They are as appli-

cable to unknown sub-surface streams as they are to filtrations and percolations through small interstices." And in Lybe's Appeal, 106 Pa. St. 634, it is said: "The rule is that, wherever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor. On the other hand, where the subterranean water is not hidden, but has a defined flow, which is known or ascertainable, rights in it will be treated on the same basis as rights in a surface stream. Whetstone *v.* Bowser, 29 Pa. St. 59.

It is therefore clear, from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on fact of knowledge, actual or reasonably acquirable, of their existence, location, and course. The principle of Coal Co. *v.* Sanderson is precisely the same as that of Wheatley *v.* Baugh, and is of general application. It is that the use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. On the question of negligence, the question of knowledge is always important, and may be conclusive. Hence the practical inquiry is — *First*, whether the damage was necessary and unavoidable; *secondly*, if not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure? In Coal Co. *v.* Sanderson the damage was unavoidable. In Wheatley *v.* Baugh it was not ascertained beforehand; hence the plaintiff had no cause of action in either case. Later cases, following Wheatley *v.* Baugh, have held that injury to springs, wells, etc., supplied by mere percolation, was not actionable; and the reason has always been the same, — that the damage could not be foreseen or avoided. If the boundaries of knowledge have been so enlarged as to make an end of the reason, then *cessante ratione, cessat ipsa lex.* Geology is progressive, and now, in many respects, a practical science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, "since the decisions in Acton *v.* Blundell, 12 Mees. & W. 324, and Wheatley *v.* Baugh, probably more deep wells have been drilled in Western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown, and merely speculative, as to the flow of water underground, has been, by experience in such cases as this, reduced almost to a certainty." If this is the state of knowledge at the present day; if the existence of a stratum of clear water, and its flow

into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water, which is likely to rise and mingle with the fresh, when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense — then, clearly, it would be a violation of the living spirit of the law not to recognize the change, and apply the settled and immutable principles of right to the altered conditions of fact. The learned judge, in his charge, said: "There is evidence from which the jury could fairly find that the defendant, when the well was drilled, knew, or ought to have known, if they had exercised any reasonable judgment, or investigated or paid attention to it, that the boring of this well in the way it was done, without shutting off the salt water from the fresh water, would almost inevitably ruin these and other wells in the immediate vicinity. And I think there is evidence from which the jury could fairly find that the defendant could with the outlay of a small amount of money, have shut off the salt water from the fresh water so that it could not have done any injury." If the jury had found the facts as this charge assumes that they fairly might on the evidence, then the plaintiff had made out a case of negligence, and was entitled to recover. Negligence in this sense is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation. If the plaintiff showed that the injury was plainly to be anticipated, and easily preventable with reasonable care and expense, he brought himself within the exception of all the cases from Wheatley *v.* Baugh to Coal Co. *v.* Sanderson, inclusive. It may be well to say that in cases of this nature, juries should be held with a firm hand to real cases of negligence within the exception, and not allowed to pare down the general rule by sympathetic verdicts in cases of loss or hardship from the proper exercise of clear rights. The danger of such result is not to be ignored, but we cannot on that account shut the door to suitors entitled to redress for genuine wrongs. The duty to maintain the line firmly where justice and law put it is in the first instance, and chiefly, upon the trial courts. Judgment reversed, and *venire de novo* awarded.

Party Wall — Use of Same — Construction of Contract for Building the Same.

Fox *v.* Mission Free School, 120 Mo. 349; 25 S. W. 172.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by Hugh L. Fox against the Missouri Free School on a party-wall contract. Judgment for defendant. Plaintiff appeals. Affirmed.

MACFARLANE, J. Plaintiff and defendant were the owners of contiguous lots, fronting, each about 65 feet, on the south side of St. Charles street, in the city of St. Louis, and extending back south about 111 feet to an alley. Previous to making the contract which is the basis of this suit, a three-story brick building, of the full width of the lot, and extending back to within about 7 feet of the alley, stood upon defendant's lot. This building was leased and used as a gymnasium. The 7-foot space between the building and the alley was occupied by one-story structures. About 40 feet on the east was constructed of brick, and used for an engine and boiler room; and the remaining portion, about 25 feet, on the west, and adjoining plaintiff's building, was built of wood, and was used for storing coal. The first and second stories of the main building were, for the convenience of the gymnasium, used as one. Plaintiff previously had a three-story building covering width of his entire lot. On the dividing line of these lots there was no parting wall, but each building was supported by its own wall, built wholly on the land of the respective owners. Plaintiff, with a view of erecting a seven-story building on his lot, had removed his building therefrom, and proposed to defendant the erection of a partition wall between their lots. Negotiations resulted in a written contract, dated July 31, 1888. This contract recited first the respective ownership of the contiguous lots, describing each; that plaintiff was about erecting upon his lot a store house building, seven stories in height above the basement; and that it was desired by the parties that the east wall of said building so to be erected should be a party wall, "and that the center line thereof should be coincident with the division line between the two adjacent lots," and, in consideration of the premises, it was agreed as follows: "That Fox shall construct the east wall of his said proposed building at his own cost and expense, so that the center or middle line of said wall shall correspond and be coincident with the line dividing the lots aforesaid of the parties, and that said wall shall be of the dimensions, materials, and constructed in the manner following, viz." Then follow the specifications for building the wall, which was to extend the whole length of the line, to be of brick, 25 inches thick for a height of 33 feet, thence up 23 inches thick for 28 feet, thence up 18 inches thick for 26 feet, and thence up 13 inches thick for the remaining distance; "one smoke flue to be built in said wall, and in every story to have a thick-

ness of 13 inches between flue and outside surface of wall; and no other flues, slats, or chaces to be built or cut in the wall by said Fox." These provisions were then agreed upon: "That the said wall so constructed as aforesaid, shall be used in common by both of the parties hereto, and their respective heirs, successors or assigns, as a 'party wall' for the support of the said building, or any addition thereto, so about to be erected by said Fox, and of any building which said party of the second part, its successors or assigns, may at any time hereafter erect upon the premises so owned by it as aforesaid: provided, however, and said party of the second part stipulates and agrees, that whenever it shall make use of said 'party wall' as a wall, and for the support of any building which may hereafter be constructed on its said premises, it shall pay to the said Fox, or his assigns, before making such use thereof, the sum of three thousand and forty-four dollars and eighty cents ($3,044.80). It is further agreed that either of said parties, at his or its own cost and expense, may alter, tear down, and rebuild, reconstruct, or add to the said party wall, in the event the same be rendered necessary at any time by fire, accident, casualty, or decay; provided, however, that the party so doing the same shall give to the other party ten days' written notice of the intention so to do, and shall hold the other harmless and indemnified against any loss or damage resulting therefrom. It is understood, however, by the parties hereto, that this agreement does not authorize said Fox to erect said wall, or in any manner to impair or affect the rights of the Missouri Gymnastic Society under its lease of the said premises owned by said party of the second part, during the unexpired term of said lease, without consent thereto of said lessee being first obtained by said Fox." The suit was upon this contract. The petition charged that plaintiff had built the wall according to agreement, and without in any manner impairing or affecting the rights of the gymnastic society, the tenants of defendant. "That in constructing said wall the plaintiff left openings therein for the joists or timbers of the building on defendant's lot occupied by said Missouri Gymnastic Society, and with the knowledge and consent of said Missouri Gymnastic Society, and of the defendant herein, inserted the joists or timbers supporting the said roof and building of said Missouri Gymnastic Society, and then and now owned by the defendant, the Mission Free School. That thereafter the said defendant did, by its agents and employees, erect a new brick building on the rear of its said lot, and in such erection did make use of said party wall as a wall, and for the support of such new brick building; and by its agents and employees did

reconstruct the old building on said premises, owned by it, and formerly occupied by the said Missouri Gymnastic Society, and in such reconstruction did make use of said party wall as a wall, and for the support of said reconstructed building. Plaintiff further states that in reconstructing the said old building the said defendant, by its agents and employees, 'anchored' or 'tied' the walls of said reconstructed building into the said party wall, for the purpose of obtaining support for said reconstructed building, and said reconstructed building is now sustained and supported, in whole or in part, by said party wall. And plaintiff further alleges that said party wall is now being used, in whole or in part, by the said defendant, or its agents and employees, as a party wall, and for the support of the said new brick building aforesaid, and for the support of said reconstructed building, which latter plaintiff avers is to all intents and purposes a new building, within the meaning and purview of said contract." Judgment was prayed for $3,044.80 and interest. The answer was a general denial.

On the trial the execution of the contract, and the proper construction of the wall according to contract, was not called into question. It was shown that defendant's old wall was taken out in order to make way for the party wall, and the building was properly supported until attached to the party wall, which thereafter supported it. The third story of the south end of defendant's building was of corrugated iron, the first and second stories were of brick, but were cracked and weak. The front or north wall, from about six feet east of the party wall, was cracked from the top down, perpendicularly, to the base stone of the lower window. This crack was from a half to three-fourths of an inch in width, and in consequence the wall leaned toward plaintiff's lot. Where the party wall was completed, the outside, which became the inside wall of defendant's building, presented the usual appearance of a rough, outside brick wall. The gymnastic society occupied defendant's building for two years after the wall was built, after which it was rented to A. C. Wickham for a bakery and restaurant for a term of ten years. The tenant was authorized to make permanent improvements and additions, and to make repairs on the premises at his own expense. Wickham proceeded to make repairs and improvements on the property in order to adapt it to his proposed uses. In order to repair the crack in the front wall he began at the cornice of the building, at the top of the wall, and removed the wall down to the base stone of the lowest window near the sidewalk. This left a portion of the wall standing between the breach thus made and Fox's party wall. He took off the top of that portion of the wall,

down to a level with the top of the highest window, leaving an open space just below the cornice, over to the party wall. He then built the breach up to the top of that window, and up to the open space running over to Fox's wall, and then built a solid wall across the breach above the window to the party wall. He then cut out a portion of the party wall 16 inches one way and 20 inches the other. The depth of this incision is not shown by the evidence. In this incision was carried the top of Wickham's new wall, just beneath the cornice, with cemented bricks, where it was held. He plastered the party wall from the ceiling to the floor. The plaster had a white finish. He placed and supported wainscoting on this wall the full length of the room. He hung gas fixtures and coat and hat racks on it, and fastened to it brackets underneath the girders, to give the room an oval and dome-like appearance at the ceiling. He constructed a partition across the building in front of the cross wall, which was sustained by being nailed to the party wall. He took out entirely about 30 feet of the north wall, leaving 3 or 4 feet next to Fox's wall to serve the purpose of a pier. Across this opening, from this pier, he threw a girder to support the brick wall above, so as to leave an open space underneath where there had been previously the solid wall. He removed the old frame coal house altogether, and rebuilt the wall of the old boiler house, which had been in part torn down by the gymnastic society in order to remove their boilers. He then built a brick wall from the west end of this reconstructed wall of the boiler house, along the alley to Fox's party wall, and there dovetailed it with cement joints into the interstices of the rubble stone work of Fox's foundation up to the top of that foundation. There he lapped his brick wall over into the top of the foundation of the party wall, which here was an inch and one-half to two inches wider than the party wall; thus presenting a shelf or shoulder of that width, upon which he rested and supported his brick wall. Above the foundation of the party wall this brick wall was joined and bonded to the party wall by cement. The party wall inclosed and formed the west end of this building, which, but for the party wall, would have been open. A new gravel roof was placed on this building, and made water-tight against Fox's party wall by the application of tar paper. These are the facts plaintiff's evidence tended to prove as set up in appellant's statement. At the close of the evidence offered by plaintiff the court directed the jury to return a verdict for defendant. Plaintiff took a nonsuit, and, after an ineffectual motion to set aside the same, appeals to this court.

The contract is the basis of plaintiff's action, and his right to recover must be found therein. The question, then, is, was there

evidence introduced on the trial which tended to prove that defendant made use of the party wall as a wall for the support of a building thereafter constructed on the premises by it or by its permission? Plaintiff argues — first, that the use of the party wall in support of the old building was equivalent to the construction of a new building, within the spirit of the contract; second, that the new uses to which the wall was applied by defendant in the construction of its building was a use as a party wall, and defendant is bound by such use to the same extent as it would have been had the use been to support a new building; and, third, that the construction of the coal house and its support by the party wall was the construction of a building within the express terms of the contract.

1. We are of the opinion that the contract clearly contemplated that the party wall should be used in the support of the old building. The agreement must be interpreted by the condition of the property at the time it was made. At that time defendant had on its premises a complete building, supported by its own four walls. The east wall was on the line of its own property. Under the contract the party wall, one-half of which was required to be on defendant's land, would necessarily occupy the space of the east wall of defendant's building, and required its entire removal. Defendant's building would therefore have been left entirely without support on that side, unless it was attached to the party wall. The contract provided that the erection of the party wall should in no manner impair or affect the rights of the tenants then occupying defendant's building. These facts plainly imply that the new wall should be used as a party wall for the old building, and that, too, without charge, until another building should be constructed on the premises. This was also clearly the construction given to the contract by the parties themselves. In building the party wall the old building was built into, and attached to it, and it was thereby supported, and no claim for compensation was made. The plain interpretation of the contract therefore is that defendant should have the use of the wall for the support of its old building, and should incur no liability until it thereafter constructed a building upon the premises. We find that like construction has been given a similar agreement under like circumstances. Shaw *v.* Hitchcock, 119 Mass. 254. Though, in the absence of a contract, the use of the wall for the support of the old building might, from the conduct of the parties, imply an agreement to pay a proper proportion of the cost thereof, no such implication can be raised under this contract, which expressly provides the condition upon which payment can be demanded.

2. There can be no doubt, under the terms of the contract, that the wall built by plaintiff became, as soon as completed, a party wall for the support of the building erected by him, and defendant had no right to make any use of the portion situate on his land which would impair its strength and efficiency for that purpose. The contract created in each of the parties reciprocal easements in the wall when built. As has been said "the idea of reciprocity pervades the whole contract," and neither party can use the wall in such a manner as would interfere with the proper and effective use by the other. Harber *v.* Evans, 101 Mo. 665; 14 S. W. 750. While this idea of mutuality of benefit and of right applies to the wall itself, as it gives support to the respective buildings, it does not prevent the parties from using the surface of the walls in such manner as the business, comfort, or taste of each may require, so long as its efficiency as a support is not impaired. If business uses required shelving to be attached to the wall, or if comfort or taste require that the surface be plastered or painted, or that pictures be hung upon it, the mutual rights of the parties in the wall would not suffice to prevent these improvements or ornamentations so long as they did not materially weaken the support. In other words "one of the joint owners of a party wall can do any act concerning it which he desires, so long as he does not injure the property of the other." Lloyd Bldg. Cont., § 185. If, as held in the preceding paragraph, the parties intended that the wall should support defendant's old building, in lieu of its wall, which was necessarily removed, then it became a party wall, to all intents and purposes, for the support of the old building, and defendant had the right without liability to make all reasonable uses of the old building. If by improper use plaintiff's rights were interfered with or affected, he would have to look for redress outside of the contract. It necessarily follows that defendant had also the right to make necessary repairs on its building without incurring liability under the contract. No one could reasonably contend that an owner could not repair one wall of his building because another wall thereof was a party wall. Aside from this, making repairs on an old building is a very different thing to constructing a building. The latter implies the erection of a new building. In the same clause and sentence of the contract in which the word "constructed" is used the parties also use, as synonymous thereto, the word "erected," which leaves no doubt or ambiguity as to what is meant. That the repairs to the wall of the old building were made in such a manner as to give the repaired wall support from the party wall

does not affect the construction of the contract. It is evident that defendant, at the time it made the contract, had determined upon no time for rebuilding and, that it also contemplated continuing the use of the old building. The right to make necessary repairs must be implied from these circumstances.

3. But it is insisted that tearing away the wooden coal house on the seven-foot space back of defendant's main building, and making, in its place, a one-story brick structure, for use as a coal house, and lapping the brick over the footings of the stone foundation, joining the wall thereof to the party wall, and "dovetailing it with cement joints into the interstices of the rubble-stone work," was the construction of a building within the meaning of the contract. The use of the party wall for the support of a building thereafter to be constructed was what defendant contracted for, and until it did so use it no liability was incurred. The price to be paid for such use was over $3,000. An independent, separate wall for the coal house could have been made at the trifling cost of a few dollars. The wall of the coal house was not built into the party wall, though doubtless it received support from it. The contract says that defendant shall be liable to pay "whenever it shall make use of the party wall as a wall, and for the support of any building which may hereafter be constructed on the premises." We think the contract should be given a reasonable construction, and not one to which no reasonable business man would have consented. It might be insisted by defendant that the words "as a wall," used in the contract, meant that the use of entire length and height of the wall was intended. Such construction would be absurd. On the other hand, a contention that the contract means any use of the wall in the construction of any building, however insignificant, would be equally absurd. There are no express words which require the adoption of either of these unreasonable constructions. The language of the contract is broad enough to admit of a reasonable interpretation. The wall, for 33 feet in height, was 25 inches thick, and cost proportionally. A substantial building at the time covered the whole of defendant's lot except seven feet in the rear. When the parties speak of a building hereafter to be constructed, can there be a doubt that they had in mind the construction of a new building in whole or in part upon the site of the old one, and such as would require the support of a substantial wall? The erection of a substantial building, which receives support from the party wall, is what the parties manifestly contemplated. Elliston *v.* Morrison, 3 Tenn. Ch. 280. We do not think the improvements and repairs made upon the premises amount to the construction of a building

thereon, within the meaning of the terms of the contract or the intention of the parties. Judgment affirmed. All concur, except Barclay, J., who is absent.

CHAPTER XVII.

LICENSES.

Village of Dwight *v.* Hayes, 150 Ill. 273; 37 N. E. 218.
Lawrence *v.* Springer, 49 N J. Eq. 289; 24 A. 933.

When Parol License is Revocable.

Village of Dwight *v.* Hayes, 150 Ill. 273; 37 N. E. 218.

Bailey, J. This was a bill in chancery, brought by John A. Hayes against the village of Dwight, to restrain the village from constructing a system of sewers so that the same will discharge the sewage of the village into Gooseberry creek, a stream of water running through the complainant's land. The complainant owns and resides on a farm containing about 212 acres, situated in Grundy County, and adjoining the south line of the county. The village of Dwight is an incorporated village, having a population of about 1,600 and situated in Livingston County, and about a mile or a mile and a half south of the south line of Grundy County, Gooseberry creek has its headwaters several miles south of Dwight, in two separate branches, one of which runs through the village, the two forming a junction about a half mile below on the land of David McWilliams, and running thence in a northerly direction across the complainant's land, which adjoins that of McWilliams on the north, and emptying into Mazon creek. Gooseberry creek, as the evidence shows, is a stream in which water constantly flows except during certain portions of the dry weather in summer, and during that time it contains pools of water at different places along its channel, sufficient in quantity and of sufficient purity to furnish drink for cattle and other domestic animals kept by the owners of the lands through which it flows. The complainant, as it appears, occupies and uses his land as a stock farm, and has been accustomed, for many years, to use the creek for watering his stock, and he has also been accustomed, during the winter season, to take from it his supply of ice for use during the summer. In the summer of 1892 the village of Dwight

commenced the construction of a system of sewers, which were to be so constructed as to discharge the sewage of the village into Gooseberry creek at a point on the land of McWilliams, a short distance below the confluence of the two branches of the creek. The complainant thereupon filed his bill to restrain the village from discharging the sewage from its proposed system of sewers into the creek, alleging that there was a constant supply of living water in the creek, sufficiently pure and good for stock; that the complainant was using his farm as a stock farm, and relied upon the waters of the creek for the purpose of watering his stock; and that he cut ice therefrom, and stored the same at his residence for the use of his family; and that the discharge of the sewage into the creek would render the water thereof unfit for the domestic uses above referred to, and would also cause noxious odors to spread over the complainant's farm, and about his place of residence, thereby rendering the same unhealthful and uncomfortable as a place in which to live, and so would cause irreparable damage to the complainant's premises and place of residence, and would create a nuisance. On the filing of the bill an injunction *pendente lite* was awarded as prayed for, and, an answer and replication having been afterwards filed, the cause was heard on pleadings and proofs, and at such hearing a decree was entered by the circuit court dismissing the bill at the complainant's costs for want of equity, but without prejudice to the complainant's right to prosecute an action at law. On appeal by the complainant to the appellate court, the decree was reversed, and the cause remanded, with directions to the circuit court to enter a decree in favor of the complainant making the injunction perpetual. From the judgment of reversal the village of Dwight now appeals to this court.

A large number of witnesses were examined, and the testimony in the record is very voluminous, and to a very considerable degree conflicting. Among other things, the opinions of many witnesses were taken as to what would be the probable effects upon the waters of the creek, as they flow across the complainant's land, and upon the surrounding atmosphere, of discharging the sewage of the village into the creek a short distance above his premises. While some of these witnesses seem to be of the opinion that no serious pollution of the water would result, and no nuisance be created, we concur in the opinion of the appellate court that the decided preponderance of the evidence sustains the conclusion that the water would thereby become so polluted as to render it unfit for domestic use, or for the drink of domestic animals; and this view is strongly reinforced by the inherent probabilities of the case. Such being the case, there can be no

doubt, as it seems to us, as to the right of the complainant to relief in equity. As said by Mr. High, in his treatise on Injunctions (section 810): "Frequent ground of application for the preventive aid of equity is found in cases of the pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured and rendered unfit for use. In cases of this nature the preventive jurisdiction of equity is well established, the general doctrine being that the fouling or pollution of water in a stream by such sewage constitutes a nuisance, and affords sufficient ground for relief by injunction. In conformity with this doctrine, the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage." In Gould on Waters (section 546) the rule is laid down as follows: "An authority over sewage is not an authority to commit a nuisance. An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage. So, an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use, and it is not a defense that the city can lawfully enter upon the premises of those who use the sewer for the purpose of abating the nuisance. And, if a few householders upon the stream have used it as a drain, a modern board cannot found a prescriptive right to corrupt the stream on such usage. If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance. In deciding upon the right of a proprietor to an injunction against such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of the system of sewers is immaterial, where the rights of an individual are invaded." See, also, Wood, Nuis., § 683 *et seq.* See also Dierks *v.* Commissioners, 142 Ill. 197; 31 N. E. 496. It is true the creek in question is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper places along its channel. But this fact manifestly would only tend to aggregate the nuisance especially in those places situated, as is the complainant's land, but a little distance from the proposed point for the discharge of the sewage. The necessary result would be that in the hot and dry weather of summer the offensive substances discharged from the sewer would accumulate and remain at or near the point of discharge, not only defiling and polluting the pools of water standing in that portion of the channel, but emitting noxious vapors, corrupting and poisoning the atmosphere in that vicinity.

The decree of the circuit court dismissing the bill is sought to be sustained on the ground that, before the complainant is entitled to an injunction, he must bring his suit at law, and have his right determined by a jury. While it is a general rule, and one which was formerly enforced with very considerable strictness, that, before a court of equity will interfere by injunction to restrain a private nuisance, the complainant must establish his right in a court of law, that rule has in modern times been somewhat relaxed. In Oswald *v.* Wolf, 129 Ill. 200; 21 N. E. 839, in discussing this branch of equity jurisdiction, we said: "Even this power was formerly exercised very sparingly, and only in extreme cases, at least until after the right and question of nuisance had been settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among authorities that, to entitle a party to equitable relief before resorting to a court of law, his case must be clear, so as to be free from substantial doubt as to his right to relief." We are disposed to think that the complainant's case is one, which, within the rule as thus laid down, entitles him to an injunction without having first established his right at law. None of the substantial facts upon which his rights rested are controverted. His title to and possession of the land across which the creek in question runs, and the intention of the village to construct its system of sewers and discharge its sewage into the creek a few rods above his land, are admitted. It is true some witnesses are produced who express the opinion that the proposed discharge of the sewage of the village into this stream will not have the effect of materially polluting the water in the creek, but, in our judgment, little weight is to be given to the testimony of witnesses who attempt to swear contrary to known and established natural laws. That the sewage of a village of 1,600 inhabitants, discharged into a small stream, will materially pollute the water of the stream, and render it unfit for domestic use, for at least a few rods below the point of discharge, is a proposition too plain and too thoroughly verified by ordinary experience and observation to admit of reasonable doubt. That such disposition by the village of its sewage will create and constitute a nuisance *per se* is a proposition too plain for serious question. The case of Wahle *v.* Reinback, 76 Ill. 322, was a bill in equity for an injunction to restrain a threatened nuisance, the nuisance consisting of constructing a privy on a lot adjoining that of the complainant, within 8 feet of the complainant's dwelling house and cellar, and within 20 feet of the well from which the complainant and his family were supplied with water for drinking, cooking, and other domestic purposes.

It was urged by the defendant that, before an injunction could issue in a case of that character, it was necessary that it should be previously determined by a jury in a trial at law that a nuisance in fact existed. This contention was overruled, the court citing in support of its judgment, among various other authorities, the following passage from Kerr on Injunctions: "The court will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." It was accordingly held that a privy so constructed and located as to corrupt the water of a well used for domestic purposes, or so near the complainant's dwelling house as to annoy him in the proper enjoyment of his property, constituted a nuisance *per se*, and that no preliminary declaration of that fact by a jury was necessary to give a court of equity jurisdiction. We are satisfied that the same rule should be applied here. The discharge of the sewage of the village into the creek, thereby corrupting the waters of the stream as it flows across the complainant's land, would create a nuisance *per se*, and the complainant was therefore clearly entitled to an injunction restraining the creation of such a threatened nuisance.

But it is contended that the complainant gave his consent to the construction of the proposed system of sewers, and to the discharge of the sewage of the village into the creek, and that he thereby estopped himself from any right to the relief now prayed for. The evidence shows that, when the construction of the proposed system of sewers was in contemplation, a public meeting of the citizens of the village of Dwight was called by the municipal authorities to consider the advisability of constructing the proposed sewers, and that the complainant was one of those who attended the meeting. It also appears that during the meeting his views were called for, and that he thereupon made a few remarks, in which, as is claimed, he expressed his approbation of the enterprise, and his willingness that the sewers should be so constructed as to discharge the sewage into the creek. He testifies on the other hand, that he at the time supposed that the sewer under consideration was merely a sewer to convey off the sewage from the buildings of the Keeley Institute, and not a general system of sewers for the entire village, and that whatever he may have said had reference solely to that one sewer, and that he did not intend to be understood as consenting to a discharge into the creek of all the sewage of the village, and there are some circumstances

corroborative of the complainant's account of the matter. How far, if at all, the subsequent action of the village authorities was taken in reliance upon what was said by the complainant at this meeting does not appear, but the evidence shows that they subsequently caused plans and specifications of the proposed system of sewers to be prepared at considerable expense, adopted the necessary ordinance providing for its construction, and entered into a contract with certain parties to construct the sewers at a stipulated price. It also appears that the contractors, after the execution of the contract, commenced its performance, by placing on the ground considerable quantities of brick and tile for the sewers. After this was done, the authorities of the village applied to the complainant for a deed granting to them the right to discharge the sewage into the creek, but that the complainant refused to give, and it is conceded that he then or thereafter revoked any oral license which he may have given to the village to discharge its sewage in that manner. The most that can be said of the complainant's consent to the proposed system of sewers, if he in fact gave such consent, is that it was a mere oral license, which was revocable at any time by the licensor. The right to pollute the waters of the creek by discharging the sewage into it was in the nature of an easement, which could be created only by grant or prescription, and a mere oral consent to such pollution of the stream vested in the village no right which it was not in the power of the complainant at any time to recall. Nor did the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers present any obstacle to such revocation. St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384; Woodward *v.* Seely, 11 Ill. 157; Tied. Real Prop., § 65, and cases cited in note. So far as the village expended money or incurred liabilities in the matter of constructing the proposed sewers, it must be held to have done so with full knowledge of the fact that the complainant had in no way obligated himself to allow the sewage to be discharged into the creek by any binding act or instrument, and that he was at liberty at any time to recall the consent which he had orally given. And if under these circumstances, and without seeking to obtain from him any grant of the right of way over his land, or the execution by him of any other binding obligations in the premises, the village authorities saw fit to take steps towards the construction of the sewers, they are hardly in a position to invoke the doctrine of estoppel for the purpose of precluding the complainant from the assertion of his legal or equitable rights in the premises.

It is finally insisted that the complainant has a complete and

adequate remedy at law, and that relief in equity should be denied for that reason. We do not understand counsel as denying that ordinarily, in cases of private nuisances of this character, the threatened damage is, in a legal sense, irreparable, so as to call for the interposition of equity, but it is claimed that because the claimant, at the request of the village authorities, submitted a proposition or offer to permit the discharge of sewage into the creek upon certain specified terms, he thereby conclusively admitted that his damages were capable of admeasurement in money, and therefore capable of being completely compensated at law. The proposition submitted was as follows: "Dwight, Ill., 7-28, 1892. R. A. Buck — Dear Sir: About the sewer, will say that I will require the creek made straight by the Gresh house, and cleaned up through the willows below the same, and the creek fenced on both sides, — three-board and two-wire fence; two bridges made across the creek; said fence and bridges to be kept in repair by the city without expense to me, and for being deprived of the use of said creek for stock watering, ice cutting, etc., consideration will be five thousand dollars ($5,000). This leaves the stench question open. J. A. Hayes." This, on being submitted to the village board, was promptly rejected. We are unable to see that any such force or effect can be given to this proposition as is contended for. A party whose personal property rights are threatened with irreparable injury may, if he sees fit, offer to accept a specified sum of money as a full compensation for the threatened injury, but such offer, when submitted and rejected, can have no tendency, as against the party making it, to show the amount or nature of his damages. In cases of this character, as in others, the law favors offers of settlement, and will not permit them afterwards to be used to the prejudice of the parties who make them. So here, the offer of settlement cannot be resorted to for the purpose of showing that the damages to the plaintiff and his property which would result from discharging the sewage of the village into the creek might be adequately remedied by a judgment at law. We concur with the appellate court in its conclusions, and its judgment will be affirmed. Judgment affirmed.

When Parol License is Irrevocable.

Lawrence *v.* Springer, 49 N. J. Eq. 289; 24 A. 933.

Appeal from court of chancery.

Bill by Charles L. Springer and William H. Springer against

Ann Lawrence. From a decree for complainants, defendant appeals. Reversed.

Beasley, C. J. The facts necessary to the intelligibility of the views to be expressed can be stated in a few words. There are three several tracts of land in the county of Gloucester lying along the Delaware river. A part of each of these consists of meadows that were injuriously affected by the flow of the tides, so that in the year 1851 commissioners were appointed under the act (Revision 642) to enable the owners of meadows to improve the same. By force of that proceeding certain embankments, drains, and sluices were established, and an apportionment of the expense of constructing and maintaining them was duly made. That this course of law was and is legal no one disputes. Of the three tracts thus improved, the respondents, who were complainants in the court below, are at present the owners of the central one, and which is drained on one side, through the property of the appellant, and on the other through that belonging to one Beckett, who is not a party to this suit. This being admittedly the legal situation, some years ago the respondents, being minded to reclaim other parts of their low lands, removed the bank on their property erected by the commissioners nearer to the river, so as to take in about 25 acres of additional meadow, and thereby at least doubled the acreage of their farm to be drained. By means of subsidiary drains laid in the superadded land thus reclaimed, they carried the water from it into the drains laid by the commissioners, so that thereby part of such water is carried and discharged through the property of the appellant, and the residue through that of Mr. Beckett, above named. The question, therefore, from this attitude of affairs, necessarily arose, by what right did the respondents burden the land of the appellant with the passage and discharge of this superadded water? It was undeniable, and was therefore admitted, that it was not, in any degree, by force of the action of the statutory commission, for it was the consequence of a radical alteration of that plan and adjustment. What the respondents claimed was and is an easement; that is, the right, in favor of their own lands, to discharge this water onto and through the lands of the appellant. There was no contention that they possessed a deed or writing granting to them such right, but their contention was that the appellant had orally consented to the imposition of this burden on her land, and that, in reliance on such assent, they had incurred certain expenses in erecting their bank and drains, and that, as a consequence, she would not in equity be permitted to recall her license. This view was sustained in chancery, and the appellant

was enjoined from stopping the flow of this water over her land, as she threatened to do.

It will be observed that the injury thus supervening involves the difficult and troublesome problem as to what extent and under what circumstances will a court of equity disregard the well-established rules of the common law, as well as the plain provision of the statute of frauds, in the establishment of a servitude of this kind. In the present instance the proposition upon which this decree has been founded is this: that a parol license, without any consideration money to the licensor, operating as a grant of an easement, is irrevocable in equity, when the licensee has gone to expenditures in the erection of structures on his own land in pursuance of such authority. In the sequel it will become requisite to consider how far this formula, even in its extremest latitude, will support the decree before us in its application to the facts of the case; but before approaching that inquiry it seems necessary, in order to avoid misconception on the subject, to consider whether the equitable principle thus propounded has any place, and, if so, to what extent, in the legal system of this State.

It has not been, and it cannot be, claimed that such a grant as the one in question cannot be enforced in a court of law. Such easements being incorporeal, lie in part, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But, while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. "The statute," says Lord Redesdale, "was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest, to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements, from the necessity of the case, would have been reduced to writing; whereas it is manifest that the decisions on the subject have opened a new door to fraud." And these strictures are pointed with the

emphatic declaration that "it is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions further." Lindsay *v.* Lynch, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Eq. Jur., § 766) says that "considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds further than they were compelled to do by former decisions." To the same purpose are the criticisms of Chancellor Kent in Phillips *v.* Thompson, 1 Johns. Ch. 149, and of Chancellor Zabriskie in Cooper *v.* Carlisle, 17 N. J. Eq. 529.

That the exception to the statute must be greatly amplified, if it is to embrace and validate the parol contract in the present instance, is entirely manifest. Indeed, it may be said that, after such an extension, it would scarcely be susceptible of further enlargement. When A. permits B. to build a house upon his land, the situation almost necessarily implies the existence of some contract which is thus partly performed between them. To some extent, therefore, such a matter does not rest absolutely in parol, and the area of possible fraud or perjury is therefore thus circumscribed and hindered. But when B., from his own land, turns his water into the drains on the land of A., the situation does not imply a contract. On the contrary, the situation denotes simply a trespass. Consequently the existence and character of the contract, if one exists, is the pure creation of parol testimony. So wide would be the principle of such an impairment of the statute that it is difficult to see how it could be circumscribed. It would seem to be applicable to the creation of every species of easement; for maybe all rights of way, all rights to light and air, the right to discharge impure water or smoke and noisome smells, and other incorporeal rights of the same kind, could, in most cases, be established by the unassisted force of parol evidence. Plainly, the principle is of great consequence, and the question is whether it prevails in this State.

In responding to this question in the affirmative the experienced and able vice-chancellor who decided this case (21 Atl. Rep. 41) relied upon two recent opinions in the court of chancery as containing the equitable rule now applicable, and which has been already expressed (Summer *v.* Seaton, 19 Atl. Rep. 884; Brewing Co. *v.* Morton, 20 Atl. Rep. 286); and in addition to these was cited the case of Water Power Co. *v.* Veghte, 21 N. J. Eq. 463. This last case was decided in this court, and rests upon satisfactory grounds, but its applicability in the present instance is not perceived. Then this court was called upon to test the equitable efficacy of a written license under certain conditions; now it is to pass upon an oral license under very different conditions. The

language of the opinion must be construed with relation to the facts then under consideration. In the reported case the statute of frauds was not a factor influencing the determination, while on the present occasion it is one of prime importance. The two cases do not stand upon the same common basis.

The two English cases cited appear to be equally alien from our present subject. One of these is that of Duke of Devonshire *v.* Eglin, 14 Beav. 530, and it is entirely plain that the circumstances called for the application of a rule altogether unlike the one now in question. In his opinion in the present case, the vice-chancellor describes this as an instance "of a parol license to maintain a water conduit across the licensor's land to supply a village with water;" but the fact that the equitable effect of such an unwritten authority, intrinsically considered, was not in any degree passed upon, appears to have escaped observation. In the reported case the answer admitted the agreement, and it was so found, the chancellor saying: "I am of the opinion that the passages read from the answer show that there was a parol agreement to allow the water-course to be made through the defendant's land in consideration of payment of a reasonable sum," and, consequently, works that had been built in reliance on such an admitted contract were not permitted to be disturbed. It is obvious that the point under consideration was not in any wise decided. The other English authority relied on is that of Mold *v.* Wheatcroft, 27 Beav. 510, but the briefest statement of the facts of that case will serve to show that the rule controlling them cannot be of any concern in our present inquiry. It is true, as the vice-chancellor says, that this "was a case of a right of way;" but such a description is not complete, for it was a right to a railway that was in question. The defendant, being invested by act of parliament with the power to lay a railway over the complainant's land, paying a reasonable compensation for such privilege, had entered upon such property with the assent of its owner, and made the construction in dispute. It was therefore a case plainly within the equitable rule, already stated, of a parol agreement for the purchase of an interest in land, and an entry and possession by force of such an agreement, and there was also parliamentary authority to do the act consented to. In short, the case is identical in all its esssential features with that of Water Power Co. *v.* Chambers, 9 N. J. Eq. 471. It certainly cannot be necessary to pause for an instant to point out the dissimilarity between such a conjuncture and the one now being considered.

The result seems to be that neither of the cases cited in the opinion of the vice-chancellor from the opinions

of the English chancellors supports in any noteworthy degree the rule embodied in the decree now before this court. Nor has it appeared from my own researches in that field that there is to be found any authority directly upon this question; but in making this remark it should be said no stress is laid on the two cases which are to be found in 2 Eq. Cas. Abr. 522, although in the State of Pennsylvania they appear to have had a decided effect in leading to the promulgation by the courts of the doctrine now under criticism. The book referred to is of slight repute, and it alludes to, rather than reports, these two judicial resolutions. The first of them is contained in six lines, stating that A diverted a water-course, which put B to great expense in laying of, etc.; and, the diversion being a nuisance to B, he brought this action, but an injunction was decreed upon a bill exhibited for that purpose, — it being proved that B did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. Short *v.* Taylor, in Lord Somers' time, was cited which was thus: "Short built a fine house. Taylor began to build another, but laid part of his foundation on Short's land. Short, seeing this, did not forbid him, but on the contrary very much encouraged it; and, when the house was built, he brought his action, and Lord Somers granted an injunction." It will be observed that this case of Short *v.* Taylor was correctly disposed of, for the facts do not seem susceptible of other than one of two interpretations, viz.: That Taylor was in possession of the land in question, with the assent of Short, in which event it was a license executed by possession, which would be enforceable in equity according to the established rule; while the other issue, from the insufficiency of its disclosures, is unintelligible in any reasonable sense, as it is not shown that the licensee had incurred any expense, or would sustain any damage, in consequence of the revocation of the authority to divert the water.

With respect to the state of the law in this country on this subject, it is sufficient to say that it exhibits much contrariety of judicial opinion. A copious collection of such authority will be found in 13 Amer. & Eng. Enc. Law. tit. "License," p. 550, and in the text of that work it is declared that "in most of the States it has been held that, even where money has been expended by the licensee on the faith of the license, the licensor may exercise his power of revocation." And, indeed, Prof. Pomeroy himself, although his work on Specific Performance is cited by the vice-chancellor in the support of the doctrine of the irrevocability of parol license of this kind, after referring to such principle as prevailing in certain jurisdictions in

this country concludes with the decided declaration that "this rule is undoubtedly opposed to the common-law doctrine concerning licenses, as it prevails in England and in most of the American States." In this view I concur, and shall conclude this succinct examination of the subject with the remark that, if the principle that licenses of this character are to be, under the conditions in question, treated as irrevocable, the same principle, if logical reasoning is to be maintained, would, of necessity, have to be extended so as to control most of the regulations of the statute of frauds, etc. If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing part performance on the side of the licensee, it would be difficult to refuse on a like ground to apply a similar quality to a sale of goods equally within the statutory condemnation. Suppose A, a merchant, should by parol purchase a cargo of merchandise of B, to be delivered at a certain day, and trusting in such agreement of sale should, to the knowledge of B, proceed at great expense to procure a vessel and prepare it for the voyage, would such sale be enforceable either at law or in equity? In such case it would not be pretended that by reason of part performance and great loss, a practical equity would arise; and yet how, in point of principle, is such supposed case distinguishable from that of one of these licenses after part performance by the licensee? The fact is that a statute that renders legal the revocation of certain classes of contracts is founded on the theory that, while by its force great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers in order that the mass of the community shall be protected against worse disaster. When the legislature has declared that in general, with respect to certain subjects, there is great danger of fraud and perjury, if parol evidence be received, how is it competent for a court to declare there is no such danger in particular instances of such subjects? What reason can be assigned why in the present case this appellant should not be protected against the danger of fraud or perjury, which the statute assumes is imminent in such cases?

My general conclusion is that servitudes cannot be imposed upon land by parol transaction, except to the extent above indicated, as evidenced by the ancient decisions in the English chancery, and that our own courts should not extend that limit. But, whatever views may be entertained by others on this subject, it is still, as it seems, demonstrably clear that the decree before this court cannot be sustained. Whether the broad rule adopted in the court below, or the narrow one just indicated, be applied for

present purposes, the result must be the same, for the proofs do not make either rule effective in favor of the respondents. Nothing is clearer or more settled than that, in all cases in which any court has validated an incumbrance imposed upon land by force of a parol contract, such contract has been required to be proved to the point of demonstration, and that the repudiation of it would work irreparable injury. Both these essentials are wanting to the affair before the court.

In the first place, there was no such proof as that just indicated, as to the existence of the alleged license. Such fact was attempted to be proved in two ways: *First*, by showing an express consent to the easement by the agent of the appellant; and, *second*, by the circumstance that the appellant saw the structures building on the respondents' land and remained silent. On the first head it is insisted that the son of the appellant, being her agent, gave the license in question. But the testimony in this particular is conflicting, and leaves the matter in much doubt. The son of the appellant explicitly denies that he consented to the use of the appellant's land as claimed. This denial is controverted by one of the respondents, who is supported in some degree by the other. The preponderance of proof, if it exist, is but slight, and indubitably falls far short of that measure of evidence which in these cases has always been deemed requisite. According to Prof. Pomeroy, on such occasions as this the most "certain and unmistakable evidence" is inexorably demanded, and it is manifest that this requirement is not fulfilled by the above stated evidential contradictions that are nearly in equipoise. Also, on the assumption that the agent of the appellant granted the license in question, still the case of the respondents is fatally defective, because it clearly appears that their expenditures were not made in reliance upon such license. In the entire line of cases on this subject it is believed that in no instance has relief ever been extended to a licensee who has failed to show that he has incurred large expenses in the confidence that his license would not be revoked. In the instance in hand the license that is set up was given when the entire work on the respondent's land was, in the language of the vice-chancellor, "nearly finished," so that the expenses afterwards incurred were plainly trivial. Under such circumstances, it has never been claimed, nor can it be reasonably claimed, that there is even a colorable basis for the respondents' bill; for, if they did not make their outlays because of the assurances or promises of the appellant, how is it that the latter is to be estopped from asserting her legal rights?

But, further, even if the foregoing considerations should be

waived, the respondents' case is, as it is deemed, wholly defective; for, if we assume that the son of the appellant gave the license in question, it is plain that such grant was nugatory, for in that respect the son was not the agent of his mother. Nothing can be clearer than this latter proposition, for the entire proof of agency consisted in a statement made by the son in an affidavit annexed to the answer of his mother in this case, "that he had been her agent for more than 20 years in the conduct of the business relating to her meadow lands," and, in his answer to a question when examined as a witness, that he had "had the oversight of the farm." This is the entire evidence with regard to this agency and its scope, and it is therefore confidently believed that no one versed in the law will assent, when the situation is pointed out, that such an authorization enabled the son to impose on his mother's land a permanent servitude for the benefit of her neighbor. This fatal imperfection in the case of the respondents appears to have engaged attention in the court below; but, as the defect does not reside in mere technical considerations, but in the fundamental equities of the case, it cannot now be overlooked. The respondents are clearly disentitled to the right which they assert, unless such right was conferred upon them by the appellant. It is not pretended that they had any personal communication with the appellant herself. Their entire claim is that her son, in express terms, conferred upon them the right in question, and, as is now shown, it is made to appear that the son was destitute of all legal power to do such act. No force whatever is left in their case, either in law or in equity. The subject seems too plain for discussion. It is quite common to commit farm lands to the management of superintendents, and to judicially declare that such general authorizations confer upon such agents the power to create easements in the lands so put in their charge would introduce a doctrine that would be in the highest degree both impolitic and novel. In our opinion, according to the proofs before us, this son of the appellant had no more right to impose this servitude on his mother's land than he would have had to mortgage it for the convenience of one of her neighbors.

As to the suggestion that the appellant saw this work progressing and encouraged, by her silence, such expenditures, and is therefore equitably estopped from making her present contest, the answer is that, assuming that the result thus asserted would ensue from such conduct, we think it clear that the proofs before us do not lay any foundation for the contention. There is not a particle of direct evidence to evince that the appellant knew that this work was being done, and the only indirect evidence to

that effect is that the house in which she lived was within about half a mile off, so that if she had looked she would have seen what was going on. At the time of the trial it appeared that the appellant was over 80 years of age, and was infirm in body. It is not pretended that her attention was called to the subject, so that it is only by way of a conjectural inference that she can be charged with a knowledge that the embankments in question were erecting; and, to impute such knowledge to her, what does it signify? If we say she saw her neighbor putting up certain banks on his own property, how did that act intimate to her that it was his purpose, as a necessary incident to the work in progress, to invade her own property? From the evidence it appears that it was at least practicable to drain this newly reclaimed land directly into the river, without bringing any part of its water onto the property of the appellant. Can it be said, therefore, that it is reasonable to infer that, looking at these improvements at the distance of half a mile, she must have known what was in the mind of the respondents with respect to a system of drainage? But, further than this, even if she had at the time been informed that it was in contemplation to subject her property to the servitude of being used as a drain for these reclaimed meadows, nevertheless she plainly would not have been chargeable with a knowledge that it was their purpose to accomplish such end without her consent and without legal procedure. We shall presently see that the respondents had the option of establishing a drain over the land of the appellant in a mode entirely legal, or, as they have done, in a mode entirely tortious. Consequently it would be most unreasonable to say that the appellant must have been prescient that they would adopt, not the lawful, but the tortious, method, and that thereby, impliedly, she sanctioned such trespass. We think it incontestable that the appellant did not, reading the case in the evidence before us, give the license in dispute, nor was her conduct such that the respondents had the right to infer that she had done so.

As a last consideration, it is proper to say that, if we were to adopt the doctrine prevailing in those jurisdictions already alluded to, that these parol licenses are legal and irrevocable, and were to postulate that the license in this instance was given by the appellant, and that the respondents have, in good faith, expended their moneys in reliance upon it, nevertheless it would not seem to us that the respondents would have even the semblance of a stable footing in this case. The reason of this conclusion is this: that the principle that has been supposed to justify the interference of equity in this class of cases is that without such aid the licensee would sustain irreparable loss. This is the

fundamental consideration infusing with a supposed equity every decision of this class. It is not observed that any court has ever interfered in any instance, unless upon the ground to protect the licensee from considerable and inevitable damage. This essential feature is wanting in the instance now in hand. The revocation of this assumed license could not operate disastrously to the interests of the respondents. The remedy was in their hands. All they had to do was to apply under the meadow act, and they would have obtained in substance, all the relief that has been offered them by the force of the present decree. There was, on their own showing, no necessity to call a court of equity to their aid. Their remedy at law was complete. It has never heretofore been claimed that a parol license of this nature can be sustained and enforced in a case in which its revocation will work no essential damage to its possessor. The decree should be reversed, with costs to the appellant in both courts.

CHAPTER XX.

TITLE BY ORIGINAL ACQUISITION INCLUDING ACCRETION, ADVERSE POSSESSION, STATUTE OF LIMITATIONS, ESTOPPEL, ABANDONMENT.

Nebraska *v.* Iowa, 143 U. S. 359.
Goodard *v.* Winchell, 86 Iowa, 71; 52 N. W. 1124.
Pharis *v.* Jones, 122 Mo. 125; 26 S. W. 1032.
Mission of Immaculate Virgin *v.* Cronin, 143 N. Y. 524; 38 N. E. 964.
Smith *v.* Hitchcock, 38 Neb. 104; 56 N. W. 791.
Smeberg *v.* Cunningnam, 96 Mich. 378; 56 N. W. 73.
Meacham *v.* Bunting, 156 Ill. 586; 41 N. E. 175.
Norris *v.* Ile, 152 Ill. 190; 38 N. E. 762.
Watkins *v.* Green, 101 Mich. 493; 60 N. W. 44.
Downing *v.* Mayes, 153 Ill. 330; 38 N. E. 620.
Filson *v.* Simshausen, 130 Ill. 649; 22 N. E. 835.
Pike *v.* Galvin, 29 Me. 183.
Garibaldi *v.* Shattuck, 70 Cal. 511; 11 P. 778.
School District *v.* Benson, 31 Me. 381.
Happ *v.* Happ, 156 Ill. 183; 41 N. E. 39.
Wheeler *v.* Smith, 62 Mich. 373; 28 N. W. 907.

Accretion and Avulsion Distinguished.

Nebraska *v.* Iowa, 143 U. S. 359.

Opinion by Mr. Justice Brewer.

This is an original suit, brought in this court by the State of Nebraska against the State of Iowa, the object of which is to have the boundary line between the two States determined.

Iowa was admitted into the Union in 1846, and its western boundary, as defined by the act of admission, was the middle of the main channel of the Missouri river. Nebraska was admitted in 1867, and its eastern boundary was likewise the middle of the channel of the Missouri river. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective States claiming jurisdiction over the same tract of land. To the bill filed by the State of Nebraska the State of Iowa answered, alleging that this disputed ground was part of its territory; and also filed a cross-bill praying affirmative relief, establishing its jurisdiction thereof, to which cross-bill the State of Nebraska answered. Replications were duly filed and proofs taken.

It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as "accretion," the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In New Orleans *v.* U. S., 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." See, also, Jones *v.* Soulard, 24 How. 41; Banks *v.* Ogden, 2 Wall. 57; Saulet *v.* Shepherd, 4 Wall. 502; St. Clair *v.* Lovingston, 23 Wall. 46; Jeffries *v.* Land Co., 134 U. S. 178; 10 Sup. Ct. Rep. 518.

It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, "avulsion." In Gould Waters, § 159, it is said: "But if the change is violent and visible, and arises from a known cause such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl. Comm. 262; Ang. Water-Courses, § 60; Trustees *v.* Dickinson, 8 Cush. 544; Buttenuth *v.* Bridge Co.,

123 Ill. 535; 17 N. E. Rep. 439; Hagan *v.* Campbell, 8 Port. (Ala.) 9; Murry *v.* Sermon, 1 Hawks, 56.

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel. In volume 8, Op. Attys. Gen. U. S. 175, 177, this matter received exhaustive consideration. A dispute arose between our government and Mexico in consequence of the changes in the Rio Bravo. The matter having been referred to Attorney-General Cushing, he replied at length. We quote largely from that opinion. After stating the case, he proceeds: —

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, — that is by the gradual, and, as it were, insensible, accession or abstraction of mere particles, — the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territory the river thus breaks its way suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river-bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.

"Such is the received rule of the law of nations on this point, as laid down by all the writers of authority. See *ex. gr.*, Puffend Jus. Nat. lib. iv, cap. 7, s. ii; Gundling Jus. Nat., p. 248, Wolff Jus. Gentium, ss. 106–109; Vattel Droit des Gens. liv.

i. c. 22, s. 268, 270; Stypmanni, Jus. Marit, cap. v. n. 476–552; Rayneval Droit de la Nature, tom. i. p. 307; Merlin Répertoire, ss. voc. alluv."

Further reference is made in the opinion to the following authorities: —

"Don Antonio Riquelme states the doctrine as follows: —

"'When a river changes its course, directing its currents through the territory of one of the two coterminous States, the bed which it leaves dry remains the property of the State (or States) to which the river belonged, that being retained as the limit between the two nations, and the river enters so far into the exclusive dominion of the nation through whose territory it takes the new course. Nations must, of necessity, submit their rights to these great alterations which nature predisposes and consummates. * * * But when the change is not total, but progressive only, — that is to say, when the river does not abandon either State, but only gradually shifts its course by accretions, — then it continues still to be the boundary, and the augmentation of territory which one country gains at the expense of the other is to be held by it as a new acquisition of property.' Derecho Internacional, tom. i. p. 83.

"Don Andres Bello and Don José Maria de Pando both enunciate the doctrine in exactly the same words, namely: —

"'When a river or lake divides two territories, whether it belong in common to the coterminous riparian States, or they possess it by halves, or one of them occupies it exclusively, the rights which either has in the lake or river do not undergo any change by reason of alluvion. The lands insensibly invaded by the water are lost by one of the riparian States, and those which the water abandons on the opposite bank increase the domain of the other State. But if, by any natural accident, the water which separates the two States enters of a sudden into the territory of the other, it will thenceforth belong to the State whose soil it occupies, and the land, including the abandoned river channel or bed, will incur no change of master.' Bello. Derecho Internacional, p. 38; Pando Derecho Internacional, p. 99.

"Almeda refers to the same point briefly, but in decisive terms. He says: —

"'As the river belongs to the two nations, so, also, the river-bed, if by chance it become dry, is divided between them as proprietors. When the river changes its course, throwing itself on one of two coterminous States, it then comes to belong to the State through whose territory it runs, all community of right in it so far ceasing.' Derecho Publico, tom. i. p. 199.

"Leaving authorities of this class, then, let us come to those

which discuss the question in its relation to private rights, and as a doctrine of municipal jurisprudence.

"The doctrine is transmitted to us from the law of Rome. Just. Inst. lib. ii. tit. i. ss. 20–24; Dig. lib. xii, tit. i, l, 7. See J. Voet ad Pandect. tom. i, pp. 606, 607; Heinec. Recit. lib. ii, tit. 2, ss. 358–369; Struvii Syntag. ex. 41 cc. 33–35; Bowers' Civil Law, c. 14.

"Don Alfonso transferred it from the civil law to the Partidas. Partida iii, tit. 28, l. 31. Thus it came to be, as it still remains, an established element of the laws of Spain and of Mexico. Alvarez Instituciones, lib. ii, tit. i, s. 6; Asso. Instituciones, p. 101; Gomez de la Serna Elementos, lib. ii, tit. 4, sec. 3, no. 2; Escriche Dis s. vocc. accession natural, aluvion, avulsion; Febrero Mexicano, tom. 1, p. 161; Sala Mexicano (Ed. 1845), tom. ii, p. 62.

"The same doctrine, starting from the same point of departure, made its way through the channel of Bracton, into the laws of England, and thence to the United States. Bracton de Legg. Angline, lib. 2, cap. 2, fol. 9; 2 Bl. Comm., p. 262; Wool. Waters, p. 34; Ang. Water Courses, c. 2; Lynch *v.* Allen, 4 Dev. & B. 62; Murry *v.* Sermon, 1 Hawks, p. 56; King *v.* Yarborough, 3 Barn. & C. p. 91; *Id.* 2 Bligh (N. S.), p. 147.

"Such, beyond all possible controversy, is the public law of modern Europe and America; and such, also, is the municipal law both of the Mexican republic and the United States."

Vattel states the rule thus at page 121 (book 1, c. 22, § 268): —

"If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural or intermediate bounds (*territoria arcifinia*), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side, or if it is given to me upon that footing, I thus acquired beforehand the right of alluvion; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly,' because, in the very uncommon case called 'avulsion,' when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws

have thus provided against and decided this case when it happens between individual and individual. They ought to unite equity with the welfare of the State, and the care of preventing litigations.

"In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself, because nothing is more natural than to take a river for a boundary, when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

"As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river, are in nowise changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains; but nature alone produces this change; she destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

"But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course, and runs into one of the two neighboring States, the bed which it has abandoned becomes, thenceforward, their boundary, and remains the property of the former owner of the river. (Section 267.) The river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed, and there belongs only to the State in which it flows."

The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri river, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in Jefferis *v.* Land Co., 134 U. S. 178, 189; 10 Sup. Ct.

Rep. 518. A question between individuals, growing out of changes in the very place now in controversy was then before this court; and in the opinion, after referring to the general rule, it was observed: "It is contended by the defendant that this well-settled rule is not applicable to land which borders on the Missouri river because of the peculiar character of that stream, and of the soil through which it flows, the course of the river being tortuous, the current rapid and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away. But it has been held by this court that the general law of accretion is applicable to land on the Mississippi river; and, that being so, although the changes on the Missouri river are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri river the general rule of law." It is true that that case came here on demurrer to a bill, and it was alleged in the bill that the land was formed by "imperceptible degrees," and that the process of accretion "went on so slowly that it could not be observed in its progress; but, at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." The state of facts disclosed by this averment was held not to take the case out of the law concerning accretion, and, after referring to some English authorities, it was said: "The doctrine of the English cases is that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distant points of time." And then was quoted from the opinion in St. Clair *v.* Lovingston, 23 Wall. 46, these words: "The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

The case before us is presented on testimony, and not on allegation. But what are the facts apparent from that testimony? The Missouri river is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Company across

the Missouri river in the vicinity of the tracts in controversy, the builders went down to the solid rock, 65 feet below the surface, and there found a pine log a foot and a half in diameter, — of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river, so that it may, in one sense of the term, be said, that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony: that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color, which, in the history of the country, has made it known as the "muddy" Missouri; and also that, while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual, and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process

of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change, caused by the velocity of the current, and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and onto the other, the law of accretion controls on the Missouri river as elsewhere; and that not only in respect to rights of individual land-owners, but also in respect to the boundary line between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained, as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

We think we have, by these observations, indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest.

Title by Accretion — Aerolite Falling Upon Land.

Goodard *v.* Winchell, 86 Iowa, 71; 52 N. W. 1124.

Granger, J. The district court found the following facts, with some others not important on this trial: *First.* "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section number three,

in township number ninety-eight, range number twenty-five, in Winnebago County, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. *Second.* That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. *Third.* That on the second day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. *Fourth.* That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. *Fifth.* That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for one hundred and five dollars, and the same was at once taken possession of by the said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. * * * Tenth. I find the value of said aerolite to be one hundred and one dollars ($101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effect of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the second of May, 1890; that a member of Hoagland's family saw the aerolite fall, and directed him to it." As conclusions of law, the district court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by the appellant that the conclusions of law are erroneous; that the enlightened demands of the time in which we live call for, if not a modification, a liberal construction, of the ancient rule, "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy;" and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before

belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, and supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules, and note wherein, if at all, the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title — that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by "movables," within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about sixty-six pounds weight, that "fell from the heavens" on the land of the plaintiff and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable — that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought

of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprieter," as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would

contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "tell-tale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of one hundred and one dollars, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In 15 American and English Encyclopedia of Law, page 388, is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it, the highway being a mere easement for travel." It cites the case of Maas *v.* Amana Soc., 16 Alb. Law. J. 76, and 13 Irish Law Times, 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in

France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meager to indicate the trend of legal thought. Our conclusions are announced with some doubt as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the district court is affirmed.

Adverse Possession Under Color of Title — Constructive Possession — Possession Must be Hostile.

Pharis *v.* Jones, 122 Mo. 125; 26 S. W. 1032.

Appeal from circuit court, Barry County; Joseph Cravens, Judge.

Action by D. P. Pharis against W. P. Jones. Judgment for plaintiff. Defendant appeals. Reversed.

Burgess, J. Ejectment for the S. W. ¼ of the S. W. ¼ of section 29, township 22, range 27. The petition is in the usual form and the answer a general denial. The land is timbered. At the time plaintiff obtained a quitclaim deed for it from Boon, — August 3, 1867, — it was unfenced, except about two acres on one corner, which ran down into the inclosure of what is known as the "Mason farm." Littleberry Mason, who originally owned the farm, died in 1853, leaving a widow and eight children. His widow occupied by herself and tenant, a part of the farm of which her husband died seised, which included within the part inclosed by a fence the two or three acres of the 40-acre tract in controversy as above stated. Plaintiff occupied a part of the Mason farm, including said two or three acres, as Mrs. Mason's tenant until she died, which was about six years before the trial. At the time of her death he owned six of the eight shares in the farm, and before the trial he became the owner by purchase of the other two shares. After August 3, 1867, plaintiff continued from time to time to extend the fence around the Mason farm outward on the land in controversy, until he had some twenty acres inclosed before the commencement of

this suit. All this time he claims to have been clearing and holding the land as his own, and at no time as the tenant of Mrs. Mason. Plaintiff, to maintain the issue on his part, offered in evidence the abstract of entries for Barry County of the United States land office at Springfield, Missouri, showing this land was located by Charles Ingles, August 28, 1857. He next read in evidence, over the objection of defendant, the following deeds: A deed from Sample Orr, register of lands, dated February 20, 1863, to J. W. Boon, for the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 29, township 23, range 27, and other lands. A quitclaim deed from J. W. Boon to D. P. Pharis, dated August 3, 1867, for the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 29, township 23, range 27, and other lands; consideration, $75. Plaintiff next introduced evidence tending to show actual possession of the two or three acres in the Mason farm by himself and those under whom he claimed title; acts of ownership in cutting timber, keeping off trespassers, the payment of taxes for the years 1872 and up to 1884, inclusive, and the extension of the inclosure for the last 20 years, until at the time of the trial it amounted to about 20 acres of the tract sued for. Defendant claims title under a quitclaim deed from the patentee, Charles Ingles, and wife, dated May 18, 1891. The trial resulted in a judgment for plaintiff for possession of the 40-acre tract sued for, from which defendant, after an unsuccessful motion for a new trial, and in arrest of judgment, appealed to this court. The defendant asks the court to declare the law to be as follows: "(4) That the possession and occupation of the small portion of the land in controversy by D. P. Pharis against the real owner of said pieces did not start the statute of limitation to running against the real owner, and in favor of said Pharis. (5) That the possession and occupation of the two small pieces of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 29, township 23, range 27, that extended into Littleberry Mason's field, was not an adverse holding by D. P. Pharis against the real owner of said pieces, and did not start the statute of limitations to running against the real owner, and in favor of said Pharis, till after the death of the widow of Littleberry Mason in the year 1883. (6) That the possession and occupation of the two small pieces of the S. W. qr. of the S. W. qr., and the N. E. qr. of the S. W. qr. of section 28, township 23, range 27, that extended into Littleberry Mason's field, was not such an adverse holding against the real owners of said lands by D. P. Pharis, under color of title to the whole one hundred acres of land described in the quitclaim deed from J. W. Boon to said Pharis, as would start the statute

of limitations to running again in favor of said Pharis as to the uninclosed portion of the S. W. qr. of the S. W. qr., section 29, township 23, range 27, till after the death of the widow of Littleberry Mason. (7) The court declares the law to be that the holding of Mrs. Mason, being without color or title, could not extend beyond the land actually inclosed, and that the possession of D. P. Pharis, as the grantee of Mrs. Mason of the Mason heirs, only extended to the two small pieces of land inclosed in the field belonging to the Mason estate." The instructions were all refused, and the defendant duly excepted. The deeds read in evidence by plaintiff were color of title only.

It is well-settled law that where land is occupied under a mistaken belief as to where the true line is, and with no intention to claim beyond the true line or legal boundary, such possession will not be held to be adverse so as to start the statute of limitations to running against the true owner. Thus, it was held in St. Louis University *v.* McCune, 28 Mo. 481, when a proprietor of land, through a mistake or ignorance of location of the true line separating his tract from that of adjoining proprietor, extended his fence beyond the true line, and inclosed a part of the land belonging to the adjoining owner, that the possession acquired in this way did not become adverse. The evidence in this case showed conclusively that Mrs. Mason never intended to claim as her own the two small parcels of the tract in controversy that were within her inclosure. Her possession was not, therefore, adverse to the true owner, and did not start the statute of limitations to running against him, and in her favor. But even if her possession has been adverse, as she did not claim under color of title, she, and those claiming under her in the same way, could only hold that portion which they had in actual possession for the statutory period of ten years. DeGraw *v.* Taylor, 37 Mo. 311. As long as plaintiff occupied the Mason farm and the land inclosed by fence as the tenant of Mrs. Mason, his possession was her possession, and he could not claim adversely to her. But when he extended the fence which inclosed the Mason farm out onto the land in controversy, for the purpose of taking or extending the possession, claiming it as his own, from that time the possession was his, hostile and adverse to the true owner, and by virtue of his deed from Boon, which, being color of title, extended the possession to the entire 40-acre tract. Gaines *v.* Saunders, 87 Mo. 557; Pharis *v.* Bayless (Mo. Sup., May 24, 1894), 26 S. W. 1030. Thus, it is said in Read *v.* Allen, 63 Tex. 154: "We cannot perceive upon what ground a landlord who, by a lease, has restricted the possession and use of his tenant by metes and bounds to a part of a larger tract, can claim that

his tenant's possession under such a lease extends to that which, by the terms of the lease, the tenant has no right to possess." Plaintiff only occupied, as tenant of Mrs. Mason, that portion of the land which was in the inclosure, or was a part of the Mason farm, at the time he occupied under her, and any part of the land in controversy which he subsequently inclosed by extending the fence around the Mason farm was not held by him as her tenant, and his possession thereof was adverse. Mrs. Mason's possession was without color of title, while plaintiff's color of title until he began to occupy and claim the land as his own was unaccompanied by possession. As the possession of Mrs. Mason was without color of title, it did not extend beyond the boundaries of that which was inclosed, and in so far as plaintiff claimed under her and the Mason heirs his possession could extend no farther than to the small pieces of land inclosed in the field belonging to the Mason estate. The payment of taxes on the land by plaintiff, cutting timber thereon, and keeping off trespassers, did not constitute possession, but were merely acts of ownership, tending to show that he claimed to own it. For the error of the court in refusing to declare the law as prayed for by defendant in the seventh instruction, the judgment is reversed, and the cause remanded. All of this division concur.

Possession Must be Open and Notorious.

Mission of Immaculate Virgin *v.* Cronin, 143 N. Y. 524; 38 N. E. 964.

EARL, J. This is an action of ejectment, commenced April 10, 1889, to recover about 30 acres of land known as lots 4 and 5 of the Second division of Rockaway Beach. The land extends along the Atlantic Ocean about 1,320 feet, with a depth back from the ocean of about 900 feet. In 1809 there was a partition proceeding in the court of common pleas of Queens County for the partition among alleged owners of a large tract of land including this land, and in that proceeding this land was set off to Thomas Bannister, in the right of his wife Rachel, and it was admitted upon the trial that both parties claimed under that partition. The plaintiff, upon the trial, gave no evidence of any conveyance from or under the Bannisters, and gave no documentary evidence connecting its title with the Bannister title. The only documentary evidence of title it gave was as follows: A deed dated January 28, 1869, from Benjamin C. Lockwood, Jr., and his mother, to Charles Donohue, and a deed from Donohue to the plaintiff, dated January 4, 1881. There was no

proof whatever showing any title in the grantors of Donohue from or under the Bannisters, and so there is no claim that the plaintiff had a documentary chain of title. The defendant claims the right of possession of the land as lessee from a grandson of the Bannisters, and the complaint alleges that he entered into possession of the land May 1, 1887, and he has ever since been in possession thereof. The plaintiff claims title in two ways: By adverse possession, and failing in that, by proof from which the court could presume a grant from or under the Bannisters. We think both claims of title are unfounded. This was uninclosed, uncultivated, unimproved, and unoccupied land. The plaintiff and its predecessors had exercised some acts of apparent ownership upon the land. They had claimed title to the land, surveyed it, marked the boundaries thereof by monuments, from time to time cut trees upon it, and for a few years paid the taxes thereon. All these acts, as we have frequently held, fall short of showing "adverse possession," as defined in the code (section 272). Wheeler *v.* Spinola, 54 N. Y. 377; Thompson *v.* Burhans, 61 N. Y. 52; Miller *v.* Railway Co., 71 N. Y. 380; Thompson *v* Burhans, 79 N. Y. 93; Price *v.* Brown, 101 N. Y. 669; 5 N. E. 434.

The plaintiff cannot claim constructive possession of the land under section 370 of the code, because no part of the tract was improved, and the trees cut therefrom were not cut for use upon the tract, but for use upon other land at least two miles distant. The presumption of a grant of the land from or under the Bannisters to some one of the plaintiff's predecessors rests upon an equally slender foundation. Here there was claim of title for many years, and acts upon the land consistent with, and, indeed, indicative of ownership. But such claim and acts, in the absence of actual or constructive possession going with them and characterized by them, have never of themselves been held sufficient to authorize the presumption of a grant from the true owner. The plaintiff's claim of title extends back less than twenty years prior to the defendant's possession. Its deeds are all modern, and any title derived from the Bannisters must have been modern, as they were living in 1809. If upon such facts as exist here, a grant could be presumed, it would be easy for a claimant to land to get around the careful provisions of law as to adverse possession. If he failed to show facts sufficient for adverse possession, he could yet use the same inadequate facts to raise a presumption of a grant. The plaintiff's counsel places reliance upon the two cases to which he calls our attention, and which we will notice. In Roe *v.* Strong, 119 N. Y. 316; 23 N. E. 743, there was dis-

pute as to plaintiff's title to upland and the adjacent land under the water of Setauket Bay. The plaintiff established his title to the upland, bounded by high-water mark on the bay, by a chain of title running back more than 200 years, and he showed a chain of title to the land below high-water mark in front of his upland for more than 100 years, running back to a deed from Joseph Brewster to Andrew Seaton, dated January 21, 1768; and he showed acts of ownership upon the land covered by this deed, running back so far as the memory of living witnesses could go. The land under water originally belonging to the town in which it was situated. The town had, nearly 200 years before the trial of that action, conveyed away the adjacent land under water, being all the land it owned on Setauket Bay, except the land covered by the Brewster deed, making a boundary upon the land covered by that deed. Under such circumstances, with others not here mentioned, this court held that a deed from the town to Brewster, or some one under whom he held, should be presumed, and the presumption was made in favor of the owner of the upland. That case is widely different from this. In McRoberts *v.* Bergman, 132 N. Y. 73; 30 N. E. 261, the land in dispute was a sand beach on the lower bay of New York, adjacent to the plaintiff's upland, and the beach was occupied and used in connection with the upland, and as part of the same farm, the beach and the upland constituting a single lot. The plaintiff proved a chain of title to the lot running back for much more than 100 years. Whatever presumptions were indulged in, these furnish no precedent for this case. We are therefore of opinion that the plaintiff failed to show a title to the land in question sufficient for the maintenance of this action, and that the judgment should be reversed, and a new trial granted. All concur. Judgment reversed.

Possession Must Be Exclusive.

Smith *v.* Hitchcock, 38 Neb. 104; 56 N. W. 791.

RAGAN, C. This is a suit in ejectment brought on November 9, 1889, in the district court of Douglas County by Mrs. Charity Smith against Gilbert M. Hitchcock, for a part of lot 1, in Capitol Addition to the city of Omaha. This case was tried to a jury, who, under instructions of the court, rendered a verdict for Hitchcock, and Mrs. Smith brings the case here for review.

Mrs. Smith has no paper title of any kind for any part of the property. Her claim is based wholly on possession. The

record shows that on and prior to 1869 this lot, No. 1, being 668 feet in length north and south, and 218 feet in width east and west, was owned by Mrs. Annie M. Hitchcock. She died in 1877, and the lot by her will passed to her husband, the late Senator Hitchcock. He died in 1881, and the lot descended to his son, the defendant in error. About 1870, by permission of Mrs. Hitchcock and her husband, Mrs. Smith moved a small cottage she owned upon this lot 1, near the east line thereof, and lived in this cottage at that place until 1880. Mrs. Smith did laundry work from time to time during these years for the Hitchcock family and others. She also planted part of the ground near her cottage to a garden. During all these years the Hitchcock family, consisting of Mrs. Hitchcock, her husband, and the defendant in error, and others, lived upon the lot; had on it their barn, horses, cattle, and garden, and exercised exclusive ownership and control of the whole lot. During all this time it was all under one inclosure, built and maintained by the Hitchcocks; and that part occupied by Mrs. Smith's cottage was in no other manner, than by the cottage itself, separated or severed from the remainder of the lot. Mrs. Smith, during this period, by the permission and consent of Mrs. Hitchcock and her husband, and as a kind of non-rent-paying tenant at will, or sufferance, also occupied her cottage on the lot She paid no taxes. She exercised no act of ownership over the lot or any definite portion of it. Thus matters continued until 1880, when Mrs. Smith, by the permission of Senator Hitchcock, who then owned the title to the lot as devisee of his deceased wife, and who still continued to occupy the lot with his family, removed her cottage to a point nearer the west line of said lot and some 250 feet southwest of its original location. This is the present location of the cottage. The usual occupation and control of the lot by the Hitchcocks continued as before this removal, and Mrs. Smith continued to live on uninterruptedly in her cottage. The senator died in 1881, and the defendant in error became the owner of the lot, and has since continued to reside upon it in the family homestead. In 1883 defendant in error erected three houses on a portion of the lot now claimed by Mrs. Smith, which houses have since been occupied by tenants of the defendant in error.

In 1886 Douglas street, 66 feet wide, was extended west across the entire lot, leaving the first location of Mrs. Smith's cottage north of said street. After the extension of Douglas street, the defendant in error built fences on both the north and south lines of the street, thus dividing said lot into two separate inclosed portions; one being that part of said lot lying north of

said Douglas street, and on which Mrs. Smith's cottage was first located, and on which the Hitchcock homestead and the three tenant houses aforesaid are situate; the other portion being all of said lot 1 south of Douglas street, and on which portion is now Mrs. Smith's cottage. No claim for damages was made by Mrs. Smith at the time of the extension of this Douglas street, nor did she assert or claim any ownership over the land taken for such extension, though now she claims that the land used for such extension was her property. She asserted no claim of ownership or title to any of the property at the time of the building of the tenement houses by the defendant in error.

Mrs. Smith, to recover here, must prove either a paper title or prove ten years' open, notorious, exclusive, and adverse possession. She has no paper title. She occupied, by living in her cottage, a part of this lot openly and notoriously for ten years, but no specific or definite part of the lot other than the *situs* of the cottage itself. Her possession of the lot was also concurrent with that of the owner of the legal title. It was a mixed possession; not an exclusive one. The defendant in error, the holder of the legal title, has never been out of possession of the property claimed by Mrs. Smith, and this negatives any legal presumption that her possession was adverse to his title or possession. Green *v.* Liter, 12 U. S. 229; Proprietors Kennebeck Purchase *v.* Springer, 4 Mass. 415.

But as a matter of fact or law, was Mrs. Smith's possession of this property adverse? She entered by permission of the owner, and in 1880, by his permission, moved her cottage to another part of the same premises, not involved in this case. To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title. French *v.* Pearce, 8 Conn. 439; Newell Ejectment, p. 697, § 1. There is no evidence in the record that establishes, or tends to establish, the fact that Mrs. Smith's possession was an adverse one; nor that she entered into possession of these premises with the intention of claiming them as her own, or that she ever held after her entry in hostility to the defendant in error. Mrs. Smith's entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner. Harvey *v.* Tyler, 2 Wall. U. S. 328; Allen *v.* Allen, 58 Wis. 202–209; Perkins *v.* Nugent, 45 Mich. 156; Davenport *v.* Sebring, 52 Ia. 364; Pease *v.* Lawson, 33 Mo. 35; Smith *v.*

Stevens, 82 Ill. 554; Angell Limitations, § 355. The court did not err in instructing the jury to find for the defendant.

Complaint is made because of the refusal of the trial court to permit witnesess of the plaintiff in error to answer certain questions propounded to them on the trial. No tender or offer of the evidence sought to be elicited by these questions was made, and these assignments cannot now be considered. Masters *v.* Marsh, 19 Neb. 458; Connelly *v.* Edgerton, 22 Neb. 82; Yates *v.* Kinney, 25 Neb. 120; Burns *v.* City of Fairmont, 28 Neb. 866.

Another error assigned is the overruling of the motion for a new trial on the ground of newly discovered evidence. To entitle the plaintiff to a new trial on account of newly discovered evidence, it is not enough that the evidence is material. It must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. Fitzgerald *v.* Brandt, 36 Neb. 683. The proof fails to disclose such diligence on the part of the plaintiff in error as entitled her to a new trial on the ground of newly discovered evidence, but if it did, and the evidence now claimed to be newly discovered was put into the record, it would not change the result. A new trial should not be granted on account of newly discovered evidence when such evidence if admitted could not change the result of the first trial. Kerser *v.* Decker, 29 Neb. 92. The judgment of the court is affirmed.

Possession Must be Hostile and Adverse.

Smeberg *v.* Cunningham, 96 Mich. 378; 56 N. W 73.

Opinion by GRANT, J.

Plaintiff is the owner of the record title to the land in controversy. Defendant claims title by adverse possession. The land is described in the declaration as "that portion of Palms street lying north of the center line of said street, and south of the north line of said street, and abutting on lots 15 and 16 of block 1 of White's addition to the city of Marquette." From 1871 to 1880 the Champion Iron Company was owner of the governmental subdivision which included this land. The land was mainly unoccupied, but at some time a small house had been built upon it, but when or by whom does not appear. The owners of the land do not appear to have paid much attention to it for many years, though Mr. Peter White, of Marquette, had general charge of it. A fence had been built, inclosing some of

the land around the house. The land was platted in 1888. The house is on Palms street, and the land which defendant claims is directly in front of plaintiff's lots, on which he erected a house. One of his lots fronts on Palms street, and the other is on the corner of Palms and Champion streets. While he was building his house and improving his lots, he used the street covering the land in controversy, and built with reference to it. During this time, defendant saw what he was doing, but made no objection or claim of ownership to him until after he had lived upon his lots six months, when she built a fence along the front of his lots. Poor people appear to have moved into this house at various times, and to have occupied it without paying rent or claiming any right either to the house or to the land. One Hudson, a witness for the defendant, testified that he occupied the premises with his mother in 1873, and part of 1874; that his mother was poor, the house was empty, and he knew of no authority given them to occupy it; and that when his mother moved out the defendant moved in. Defendant occupied it until some time in 1888 or 1889, when she removed to another part of the city, but her daughter testifies that she left some goods in the house, and that she had boarders who slept there. The character of the possession will appear from defendant's own testimony: Question. State how you came to go and live there. Answer. Well, a man by the name of Mr. Neff lived in the house, and my man worked there. We lived by the furnace, and he came into the house, and said that it was a good place for a poor family, and that it would be near his work, and he said that he lived in there quite a good many years, and he said that he never paid any rent, nor no rent was ever asked of him, he says; and he said that he had poor health, and couldn't do any work. He worked on the docks. 'That I ain't able to do,' he says; 'I am going out West to get a bit of land.' Well, then I saw my husband and asked him whether I would go. I says, 'I would like to look at it;' and he said it was pretty good, and 'you will never have to pay any rent.' So I went and moved in there, to see how we would get along there, and I told Mrs. Swineford I would live there, and make it my home, and the rest of my family, and keep it; when nobody was looking for rent, I would keep it." On cross-examination she testified that, some five or six years after she went into the house, she had a conversation with a Mr. Ely, in which he told her that it was his brother and Mr. Wells who owned the house, and that "the reason she kept it was because they were dead." Her daughter was asked what claim she heard her mother make, and she replied: "Quite a few times, when I was going to visit her,

she always said she was going to live there, because my father, he wanted to go out West, and she wouldn't go. It was a wild place, and she had a place of her own. Question. Did she give any reason for her claim? Answer. She thought nobody had ever bothered her, and never had come to look for rent, and bother with her place, and she thought she might as well stay there." On cross-examination this witness said that if her mother had had to pay rent she would not have lived there. Meanwhile, the owners of the land paid the taxes, and the property was sold and mortgaged, and the owners of the record title exercised the usual acts of ownership over land situated as this was. Defendant was poor, and during a large portion of the time of her occupancy of this house was the recipient of aid from the poor fund of the county. Mr. Maynard, for many years one of the superintendents of the poor, testified that in 1885 she asked him to pay the rent of the house, saying that she was not able to do it. Peter White testified that in 1880, after the land was sold by the Champion Iron Company, he had the entire charge of the property, paid the taxes, exercised other acts of ownership over it, and in that year asked the defendant to pay rent, and she replied she was too poor to pay it. These statements were denied by her, and, so far as they are concerned, it was, of course, a question for the jury. The following special questions were submitted to the jury at the request of defendant's counsel, and respectively answered by the jury, as follows: "Question. Did the defendant occupy the premises in dispute, either by herself or her tenants or boarders, or both, for a period of fifteen years, continuously, prior to the commencement of this suit, without recognizing any one as her landlord? Answer. Yes. Q. Did the defendant ever pay rent to anyone for the premises in dispute. A. No."

1. The court, as requested, should have instructed the jury that the defendant had failed to establish title by adverse possession. She did not enter under any claim or color of right, nor in the belief that she had any right. Her entry and possession were the same as those of former occupants who claimed no right to the property. She did not intend to retain possession, according to her own evidence, any longer than she could do so without the payment of rent. This was a recognition of title in some one else, and was conclusive evidence that her entry and possession were subject to that title. The answers to the special questions do not, of themselves, establish a case of adverse possession necessary to establish title. Mere possession is not sufficient. It must not only be actual, continuous, visible and notorious, but it must be hostile to the title of the real owner.

An entry with the intent to remain in possession until the real owner claims it, or demands rent, is not hostile. These questions clearly gave the jury to understand that such possession was sufficient to establish title in defendant. Their verdict can be explained upon no other theory. Her actual residence upon the property was not 15 years. Including the time during which, according to her daughter's testimony, she had some goods in the house, her possession was barely 15 years. The statute of limitations, in such cases, begins to run only from some act of possession so open, notorious and hostile that it constitutes, in law, a notice to the real owner. The entry, under the circumstances of this case, was not such an act. No subsequent act or assertion upon her part, even if sufficient, is shown to have occurred 15 years prior to the commencement of the suit. It was said by Mr. Justice Campbell in Campau *v.* Lafferty, 43 Mich. 431; 5 N. W. Rep. 648, "that a holding cannot be adverse if the holder does not believe in his title." It was also said in that case that "a possession may be maintained long enough by an undisturbed and defiant trespasser to bar an ejectment." The defendant in this case did not believe in her title, nor was she a defiant trespasser.

2. It is contended that the plaintiff has no such title in this land as would sustain an action of ejectment. The plaintiff is the owner of the fee of the land to the center of the street, and has the right to its use, subject to the public easement. He may set out shade trees, construct a sidewalk and exercise other acts of ownership and possession which do not interfere with the public use. He has a valid and subsisting interest, under How. St., § 7790. The rights of the public are not here in issue, and the question whether the municipality could maintain an action of ejectment is not involved. Plaintiff was ousted of his possession and use by the act of the defendant. Under such circumstances, ejectment is the poper remedy. Judgment reversed, and new trial ordered. The other justices concurred.

Adverse Possession by Trustee — Tenancy by the Curtesy.

Meacham *v.* Bunting, 156 Ill. 586; 41 N. E. 175.

Wilkin, J. Urban D. Meacham and Prudence Geddis were married in 1836. They removed from Wisconsin to Freeport, this State, in 1852, and there lived as husband and wife until 1862. One son, born of this marriage in 1836, is still living. On the 29th of November, 1856, the husband purchased of one Sindlinger lots 6 and 7 in block 5 in Wright

and Purinton's addition to the city of Freeport, the deed conveying the same to him, "in trust for the use and benefit of Prudence Meacham," then his wife. Both went into possession of the property in 1857, and occupied it as a home until 1862, and the husband continued in possession until his death, in January, 1892. In 1864 he obtained a decree of divorce in the circuit court of Ogle County from his wife, and by a second marriage became the father of a daughter, Jessie, and a son, James. The mother of these children resided with the father on the premises until her death, and the children continued to live with him until he died. By a general devise in his last will their father gave these children the title he then held, if any, to the lots. The former wife also remarried, her present name being Prudence Bunting. In 1893 she brought action of ejectment in the court below, claiming said property as owner in fee, and making Jessie and James Meacham, with others, defendants. Issue being joined, and a trial by jury, the court directed a verdict for the plaintiff, and entered judgment accordingly. The defendants appeal.

By the pleadings the issue whether plaintiff's right of action was barred by the 20-years statute of limitations is properly raised, and is the controlling question in the case. The parties agree that by the terms of the deed from Sindlinger to Urban D. Meacham he became the naked trustee of his wife, Prudence, and that the legal title to the property conveyed would therefore, under the general rule, vest in her by force of the statute of uses. It is also conceded that, inasmuch as she was not *sui juris* under the law in force at the time the deed was executed, the title did not immediately vest in her, but was left in her husband for her use. But counsel for appellants say the statute took effect, and she became seised of the estate in her own right, upon the dissolution of the marriage, in 1864, and from that time the possession of the husband was adverse; therefore the statute then run against her. On behalf of appellee it is contended that, even if the legal title did vest in her at the date of the decree of divorce, still, by reason of his marriage, and the prior birth of issue, her husband took an estate in the property upon the execution and delivery of the deed from Sindlinger, as tenant by the curtesy initiate, and hence his right of action did not accrue until his death. To the first of these positions opposing counsel insist that it is held the title does not, in such cases, vest in the *cestui que trust* immediately for the very purpose of excluding all marital rights of the husband, and therefore Urban D. Meacham never became tenant by the curtesy; and, even if he did, the decree of divorce destroyed that as well as all other

marital rights in him. Appellee's counsel also deny that Urban D. Meacham's possession was at any time adverse to her.

First. Did Urban D. Meacham have a life estate in the premises prior to the divorce? If the statute of uses had operated at the time of the conveyance to vest the estate in the *cestui que trust*, the wife, there being issue then born, the husband would have become tenant by the curtesy initiate, precisely as though the deed from Sindlinger had been directly to her. But, being a married woman, the statute of uses did not execute the trust, and the legal title remained in her husband, the trustee, for her use. Dean *v.* Long, 122 Ill. 447; 14 N. E. 34; citing Perry Trusts, § 310. This author says: "If an estate be given to trustees upon a trust for a married woman for her sole and separate use, * * * the legal estate will vest in the trustees, and the statute will not execute it in the *cestui que trust*. In all these cases the court will give this construction to the gift if possible, for, if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor. These are not the only words necessary to prevent the estate from vesting. Any words that show an intent to create an estate or a trust for the sole and separate use of a married woman will have the same effect." Other authorities are to the same effect, and it seems to be the settled rule that, where the trust is expressly "for the separate use" or "for the sole use and benefit" of a married woman, courts will not allow the statute to execute it in her, because the effect might be to let in marital rights of her husband, and thereby deprive her of the sole and separate use, contrary to the intention of the party creating the trust. Nevertheless, it is well understood that a husband's right to an estate by the curtesy may attach to an equitable as well as legal estate held by his wife during coverture, and there can be no doubt that he may have such right in real estate conveyed to another for her use. Whether she holds the property by a direct conveyance, or as the *cestui que trust* therein, if it appears that the grantor intended to exclude the husband from the curtesy courts will give effect to that intention. Pool *v.* Blakie, 53 Ill. 495; Monroe *v.* Van Meter, 100 Ill. 347. But the husband can be deprived of his marital rights only when the intention to do so clearly appears. Carter *v.* Dale, 3 Lea, 710; Cushing *v.* Blake, 30 N. J. Eq. 689; Hill Trusts, 405; Steadman *v.* Palling, 3 Atk. 423; Tyler Cov. There is nothing in the language of the deed in question to indicate a purpose on the part of the grantor to convey the property for the sole and separate use of Prudence Meacham.

In fact, the fair inference is that Sindlinger, the grantor, had no purpose whatever in conveying the lots in trust except to carry out the wish of Mr. Meacham, who purchased them. That he (the husband) intended by the words, "in trust for the use and benefit of Prudence Meacham," to exclude himself from all right in the property by the curtesy cannot be presumed, and his conduct after the divorce was wholly inconsistent with any such intention. We think the authorities fully sustain the position that he, at the date of the Sindlinger deed, became tenant by the curtesy initiate in the premises.

Was that estate destroyed by the decree of divorce? While the evidence does not show the grounds upon which it was obtained, it does appear that it was upon the application of the husband, and must therefore have been rendered not for his fault, but that of the defendant, his wife. While many cases hold "a divorce *a vincula* destroys the husband's right to curtesy," they speak of such a divorce as at common law, which rendered the marriage void *ab initio*. Although the only divorce known to our law is "*a vincula*," it may, under the statute, be granted for causes arising after the marriage; and the decree does not avoid it from the beginning. The marriage is legal until dissolved, and we think rights acquired during its legal existence cannot be destroyed by its dissolution unless the statute so expressly provides. This view is sustained by the case of Wait *v.* Wait, 4 N. Y. 95. The New York statute said, "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." The court of appeals held, where a divorce was granted for any other cause than the misconduct of the wife, she was entitled to dower, and said: "A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. * * * Until our statute, there was no such thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of law under whose authority it is granted. The common-law divorce avoided the marriage and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights

it conferred and obligations it imposed continue where the legislature has failed to interfere. In determining the question before us, therefore, we are to ascertain the will of the legislature, the intent and effect of the statute under which the divorce in question was granted. When a divorce is under the statute the operation of the decree is wholly prospective. * * * If it was the intention of the legislature that, in case of a divorce under the statute, the wife should in no event be entitled to dower, why not make the provision general instead of depriving the wife of dower only in case of her being convicted of adultery? '*Expressio unius exclusio alterius.*'" When the decree in question was obtained our statute provided: "If any woman shall be divorced from her husband for the fault or misconduct of such husband, except where the marriage was void from the beginning, she shall not thereby lose her dower, nor the benefit of such jointure; but if such divorce be for her fault or misconduct she shall forfeit the same; and when a divorce is obtained for the fault and misconduct of the husband he shall lose his right to be tenant by the curtesy in the wife's lands, and also any estate granted therein by the laws of this State." Chancery Code (Scates Treat. & Blackwell's Ed.) St. 1858, No. 7, § 12, tit. "Dower." Certainly it did not take away the husband's right to be tenant by the curtesy in his divorced wife's lands, but clearly shows an intention by the legislature to secure him in that right, if the divorce was obtained for cause, other than his fault or misconduct. As said in Wait *v.* Wait, *supra*, if the legislature intended that, in case of divorce under the statute, the husband should in no event be entitled to tenancy by the curtesy, why not make the provision general, instead of only in case of the divorce being obtained for his fault? The husband's tenancy by the curtesy initiate was not defeated by the decree of divorce in his favor, but terminated only upon his death; and therefore the appellee's right of action did not accrue until he died in 1863. The possession of land by a tenant for life cannot be adverse to the remainder-man or reversioner. Mettler *v.* Miller, 129 Ill. 630; 22 N. E. 529, and cases cited.

We are also of opinion that, without reference to his tenancy by the curtesy, the possession of Urban D. Meacham was at no time adverse to appellee, within the meaning of the statute of limitations. He entered under the sindlinger deed, and *prima facie* continued to hold possession under it. If the defendants below, claiming under him, denied that fact, the burden was upon them to prove it; and this they wholly failed to do. Adverse possession, sufficient to defeat the legal title, must be hostile in its inception, and continue uninterruptedly for twenty

years. It must be acquired and retained under claim of title inconsistent with that of the true owner. Turney *v.* Chamberlain, 15 Ill. 271. See, also, Morse *v.* Seibold, 147 Ill. 318; 35 N. E. 369, and cases cited. He entered as a trustee under the Sindlinger deed, and he could only afterwards claim to hold adversely to that title by surrendering the possession, and retaking it. O'Halloran *v.* Fitzgerald, 71 Ill. 53; Reynolds *v.* Sumner, 126 Ill. 58; 18 N. E. 334. The entry was with appellee's consent, and therefore not adverse. Timmons *v.* Kidwell, 138 Ill. 12; 27 N. E. 756. The possession was consistent with the title of the real owner, and "nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner would render the possession, however long continued, adverse." Rigg *v.* Cook, 4 Gilman, 351, followed by Transportation Co. *v.* Gill, 111 Ill. 541. No other verdict than that which the jury was instructed to return could have been properly rendered in this case. The judgment of the circuit court will be affirmed. Affirmed.

Possession not Adverse to Mortgagee, Until Default in Mortgage.

Norris *v.* Ile, 152 Ill. 190; 38 N. E. 762.

MAGRUDER, J. This is an action of ejectment, brought by appellant against appellee, for the recovery of the N. W. $\frac{1}{4}$, section 24, township 1 S., range 9 E. of the third P. M. in Wayne County. The case was tried, by agreement, before the court without a jury. The finding and judgment were for the defendant, and the present appeal is prosecuted from such judgment.

The land involved was originally a part of the swamp lands granted to the State by act of Congress, approved September 28, 1850 (2 Starr & C. Ann. St., p. 2379), and granted by the States to the several counties in which they were located by act of the legislature approved June 22, 1852 (1 Adams & D. Real Estate Stat. & Dec. Ill., p. 898). It is conceded that the county of Wayne had good title to the swamp lands therein under said acts, and both parties deraign their title from said county. Appellee claims title through a foreclosure sale in a proceeding to foreclose a mortgage executed by said county, and conveying certain swamp lands, including the quarter section above mentioned. Appellant claims title through a deed of the same swamp lands, executed by said county after the execution of said mortgage, and after the filing of the bill to foreclose the same

On April 20, 1859, the county of Wayne executed to Isaac Seymour, trustee, of New York, a mortgage upon 103,818 acres of its swamp lands (less 3,800 acres pre-empted), to secure the payment of construction bonds of the Mt. Vernon Railroad Company to the amount of $800,000, and at the same time also executed to said Seymour, as trustee, a trust deed conveying said lands to him upon certain trusts relating to the construction of said road and the raising of funds therefor, and containing recitals similar to those in the mortgage, and equally in the interests of the holders of said bonds. Said mortgage and trust deed were recorded in the recorder's office of Wayne County on May 3, 1859. On the same day the Mt. Vernon Railroad Company executed a mortgage upon its contemplated railroad, its appurtenances, franchises, and all its property and effects, present and prospective, to the said Seymour, as trustee, for the purpose of securing said bonds and for the benefit of the holders thereof. A fuller description of these instruments, and of the proceedings leading up to their execution, will be found in Kenicott *v.* Supervisors, 16 Wall. 452, and Scates *v.* King, 110 Ill. 456. On March 7, 1865, John W. Kenicott and others, holders of some of said bonds, filed a bill in the circuit court of the United States for the southern district of Illinois against the Mt. Vernon Railroad Company and the county of Wayne to foreclose said mortgages and trust deed, alleging, among other things, the death of Seymour, the trustee, and that by reason thereof the trust had become incapable of execution except by the aid of the courts, and praying for an accounting and for such other relief as might be just and equitable. On March 29, 1866, the complainants in said foreclosure suit filed an amended bill, setting up more specifically the facts in relation to the organization of the company and praying that a trustee be appointed in the place of Seymour to execute the trust under the direction of the court, or for a decree foreclosing said mortgages or deed of trust. On October 1, 1866, complainants filed a second amended bill setting forth said mortgages, and provisions of the charter of said railroad company, and the action of the county court in calling and holding an election to take the vote of the people upon the question of aiding in the construction of a railroad by the appropriation of the swamp land to that purpose, and in ordering the execution of said mortgages, and praying for a foreclosure of said mortgages and trust deed. Summons, issued upon the original bill, was served upon the county on March 11, 1865. The railroad company was also served, and default was entered against it on June 1, 1868, and a decree of sale entered against it on June 18, 1868,

under which the company's road, franchises, and effects were sold by the master to the company, and subsequently conveyed to it by a master's deed. Scates *v.* King, *supra*. On January 17, 1870, to which date the cause had been continued on the docket as to the county of Wayne, the said complainants filed a third amended bill, containing the same allegations and prayer as the former bill, and setting up, in addition to such allegations, that on November 19, 1858, the county of Wayne had made a written contract with Vanduzer, Smith & Co. for the construction of a railroad from Mt. Vernon, in Jefferson County, to the eastern boundary of Wayne County, thus running across the entire width of the latter county; and that Vanduzer, Smith & Co. thereafter assigned their interest in said contract to the Mt. Vernon Railroad Company. The contract thus assigned is more fully described in Kenicott *v.* Supervisors, *supra*, and Scates *v.* King, *supra*. This bill was answered by the county upon its merits. A hearing was had on January 2, 1871, and a decree dismissing the bill was entered by said circuit court of the United States. This decree, upon appeal to the Supreme Court of the United States, was reversed, and the cause was remanded to the circuit court, as will be seen by reference to Kenicott *v.* Supervisors, *supra*. On June 25, 1874, a decree was entered by said circuit court, foreclosing the mortgage and trust deed executed by the county of Wayne, and directing a sale of said lands by the master, and ordering that said county, and all persons claiming under it as purchasers or grantees *pendente lite* "since the commencement of this suit," be forever barred and foreclosed from all equity of redemption in said mortgaged premises, unless redeemed according to the laws of Illinois; and that the purchaser at the master's sale be let into possession, and that said county or railroad company, or purchaser *pendente lite* under either of them, who might be in possession, and any person coming into possession since the commencement of the suit, should surrender possession on the production of the master's deed. The decree of foreclosure and sale thus entered by the circuit court was taken by appeal to the Supreme Court of the United States, and was there affirmed, as will be seen by reference to the case of Supervisors *v.* Kenicott, 94 U. S. 498. Thereafter, on September 18, 1877, a sale was made by the master in chancery of the circuit court, under said decree, to the trustees of the complainants, and a certificate of purchase was issued to them, and by them assigned to N. M. Broadwell, to whom a master's deed of said lands was executed on May 5, 1879. By a regular claim of conveyance, the title thus acquired

by Broadwell has passed to and become vested in the appellee herein, Charles Ile.

On October 13, 1868, the county clerk of Wayne County, in pursuance of an order entered on October 5, 1868, executed quit-claim deeds to the Illinois Southwestern Railway Company, conveying all the lands involved in the Kenicott suit, and other lands, which deed, by the terms of a contract between said county and said railway company, were held in escrow by one Alexander, as trustee, until the fulfillment of certain conditions, and were not delivered until July 1, 1870 (said conditions having been performed on April 14 and May 1, 1870), and were not recorded until June 15, 1872. The Illinois Southeastern Railway Company was in December, 1869, consolidated with the Pana, Springfield & Northwestern Company, the name of the consolidated company being the Springfield & Illinois Southeastern Railway Company. By deed dated July 29, 1871, and recorded June 15, 1872, the Illinois Southeastern Railway Company conveyed the lands in question to the Springfield & Illinois Southeastern Railway Company; and the latter company, by deed dated July 10, 1871, and recorded May 31, 1872, conveyed said lands to said C. A. Beecher. By regular conveyances, whatever title was thus acquired by C. A. Beecher has passed to and become vested in the appellant herein, George W. Norris.

As the Illinois Southeastern Railway Company did not obtain its deed from Wayne County until 1868, it was, of course, bound to take notice of the mortgage made by the county to Seymour as trustee, which had been executed and recorded as early as 1859. The deed of 1868 was subject to the mortgage of 1859, and the holders of the bonds secured by the mortgage were entitled to priority, in the enforcement of their security over the subsequent purchaser of the equity of redemption. It is shown by the proof, and is not denied by appellant, that the grantee in the deed of 1868 had actual, as well as constructive, notice of the mortgage of 1859. But it is claimed that such notice cannot have the effect of postponing the rights of those claiming under the deed to the rights of those claiming under the mortgage, because of the alleged void character of the mortgage. It is urged that the county court had no power to execute the mortgage; that consequently nothing passed by it; and that the grantee in the deed of 1868, having notice of such want of power, was authorized to disregard the mortgage, and accept a conveyance of the land as though no such mortgage existed. In support of this position, reference is made to the case of Scates *v.* King, 110 Ill. 456. It was held in that case that the

trust deed and mortgage made by the county of Wayne in 1859 were void for want of power to execute them. There, the deeds to King were executed by the county before the bill to foreclose the mortgage to Seymour was filed, and King was not made a party to the foreclosure proceedings. Accordingly, his rights were not cut off by the foreclosure decree. Here, however, the railway company, under which appellant holds its title, obtained its deed after the bill to foreclose was filed, and after the service of process therein; and the company was therefore a purchaser *pendente lite*, and took its interest in the land subject to the foreclosure decree, as will hereafter appear. We concur in the doctrine announced in Scates *v.* King, *supra*, as being in harmony with the decisions of this court, and would follow that case as a precedent, rather than the case of Kenicott *v.* Supervisors, *supra*, were it not that the decision in the latter case has conclusively settled the title to the property involved in the case at bar as between appellant and appellee. In Kenicott *v.* Supervisors, *supra*, the Supreme Court of the United States held that the county of Wayne had the power to execute the trust deed and mortgage to Seymour, and that the same were valid and that Kenicott and the other holders of the bonds thereby secured were entitled to a decree foreclosing the same. The same conclusion was announced in the subsequent case of Supervisors *v.* Kenicott, 94 U. S. 498. The decision thus made by the Federal court, whether right or wrong, is binding upon the parties to the foreclosure suit and those purchasing during its pendency. As to them it is *res adjudicata*, and cannot be attacked collaterally. The circuit court of the United States had jurisdiction over the subject-matter and the parties in the foreclosure suit; and where it is made to appear that a court has such jurisdiction, the judgment or decree pronounced by it must be held to be conclusive and binding upon the parties thereto and their privies, although the court may have proceeded irregularly, or erred in its application of the law in the case before it. Maloney *v.* Dewey, 127 Ill. 395; 19 N. E. 848. In Scates *v.* King, *supra*, we said: "It is claimed by counsel for appellant that the decree of foreclosure in the United States court finally settled, as *res adjudicata*, the fact of making the mortgage, the power and authority of the county to make it, and the liability of the county to pay the debt thereby secured. It is conceded, however, that, so far as the county is concerned, the above facts are conclusively settled by the decree in that case."

But appellant contends that the grantee in the deed of 1868 was not a purchaser *pendente lite* in such sense that its rights can be controlled by the rule applicable to purchases made dur-

ing the pendency of litigation. Chancellor Kent has said that *lis pendens* is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. Murry *v.* Ballou, 1 Johns. Ch. 556. It was one of the ordinances of Lord Bacon that "no decree bindeth any that come in *bona fide* by the conveyance from the defendant before the bill exhibited, and is made no party either by bill or order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color or allowance or privity of the court, where the decree bindeth." *Id.* Whether the object of *lis pendens* be constructive notice, or to hold the subject of the suit, or *res*, within the power of the court, so as to enable the court to give effect to its judgment or decree, the decision of the court will be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit. 2 Pom. Eq. Jur., § 632. The doctrine of *lis pendens* is founded upon public convenience and necessity. Durand *v.* Lord, 115 Ill. 610; 4 N. E. 483. The *lis pendens* begins from the service of the summons or subpoena after the filing of the bill. Grant *v.* Benedict, 96 Ill. 513. A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing. If this were not the rule, parties might, by transferring their interests during the pendency of the suit, defeat its whole purpose, and make the litigation endless. A purchaser *pendente lite* from a mortgagor is, to all intents and purposes, a party to the decree of foreclosure, because the same proceedings can be had against him which can be taken against the mortgagor. He who purchases property during the pendency of the suit is as exclusively bound by the result of the litigation as if he had been a party thereto from the outset. Loomis *v.* Riley, 24 Ill. 307; Jackson *v.* Warren, 32 Ill. 331; Dickson *v.* Todd, 43 Ill. 504; 1 Story Eq. Jur., § 406; Tilton *v.* Cofield, 93 U. S. 163. An application of these principles to the facts of the present case will show that the Illinois Southeastern Railway Company, and those deraigning their title from that company, were as much bound by the decree of foreclosure in the Kenicott suit as though they had been parties thereto. As the bill was filed on March 7, 1865, and summons was served upon Wayne County on March 11, 1865, the railway company, taking a deed from the county in October, 1868, was certainly a purchaser *pendente lite*.

Is there anything in the pleading or amendments or mode of prosecution in the foreclosure suit which relieves the deed of

1868 from the operation of the general rules as to *lis pendens?* It is claimed that the original bill, filed on March 7, 1865, was too indefinite in its allegations and in the language of its prayer to warrant a decree of foreclosure. In addition to what has already been stated in relation to the contents and prayer of said bill, it sets up the act of February 15, 1855, incorporating the Mt. Vernon Railroad Company for building a railroad, etc.; alleges the ownership of the swamp lands by Wayne County, and that the county was authorized, by section 9 of said act, to aid in the construction of said railroad under the provisions of sections 7, 8, and 9 of said act; that the county court of said county, on September 28, 1855, ordered an election to be held on November 5, 1855, under said section 8, to decide whether said lands should be mortgaged to aid in such construction; that said election resulted in favor of appropriating the swamp lands for such purpose; that in pursuance of such vote, and of an order entered on April 20, 1859, said county executed two indentures on that day to Isaac Seymour, trustee, conveying said swamp lands in trust for the uses and purposes therein described, copies of which were filed as Exhibits A and B, and made a part of the bill. The bill then gives a list of lands conveyed, and further alleges that complainants were holders of some of the bonds secured by said indentures; that the interest on the same had not been paid by the county of Wayne or the railroad company; and that the said mortgages and trust deed had become forfeited by reason of such default, etc. The objections which counsel make to the bill, as we understand them, are that, while the trust deed made by the county was filed as an exhibit, the mortgage executed by it was not filed as an exhibit, and that there was not a specific prayer for foreclosure. We do not deem it necessary to discuss the sufficiency or insufficieny of the original bill, because, even if it was so defective in the respects indicated as not to be effective as a *lis pendens*, the amended bills filed on March 29, 1866, and October 1, 1866, were free from the defects complained of. These amended bills of 1866, particularly the second one, not only described more fully all the proceedings referred to in the original bill, but they set forth in detail and at large the provisions of the mortgage made by the county to Seymour on April 20, 1859, describing the lands thereby conveyed, and stating that said mortgage had been recorded in the recorder's office of Wayne County on a certain day and in a certain book, and on certain pages of that book. The prayer contained all that was in the prayer of the original bill, and, in addition thereto, prayed either for the appointment of a new

trustee, in the place of Seymour, and that he be directed to execute the trust, or, in the alternative, as follows: "If it shall appear that your orators are entitled to a decree foreclosing said mortgages or deed of trust, and are entitled to relief by a direct order of the sale of said lands or of any part thereof, that said decree may be rendered, and for such other and further relief as to your honors may seem equitable and just."

Three facts are necessary to the existence of a valid *lis pendens:* First, the property involved must be of such a character as to be subject to the rule; second, the court must have jurisdiction both of the person and the *res;* third, the *res*, or property involved, must be sufficiently described in the pleadings. Benn. Lis Pend., p. 153. We think that all these requirements are met in the amended bills of 1866. The legal maxim that that is certain which can be made certain applies to the question whether property is sufficiently described to create *lis pendens.* The description of the property may be such that, by reference and upon inquiry, it may be ascertained. It must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril; and any one reading the bill must be able to learn thereby what property is intended to be made the subject of litigation. Miller *v.* Sheery, 2 Wall. 237; Green *v.* Slayter, 4 Johns. Ch. 38; Allen *v.* Poole, 54 Miss. 323; 13 Am. & Eng. Enc. Law, p. 877. Where a bill originally so defective in the description of the property involved or in the language of its prayer, as not to create a *lis pendens*, is subsequently cured by amendment in these particulars, the *lis pendens* will commence at the time of filing the amendment, where the defendant has been served with process. 13 Am. & Eng. Enc. Law, p. 886, and cases in note. In the case at bar the purchase *pendente lite* was made after the amendments of 1866, and after service of summons upon the county.

It is further contended, on behalf of appellant, that *lis pendens* ended in June, 1868, when a decree of sale was entered upon the mortgage executed by the Mt. Vernon Railroad Company. The bill was filed to foreclose three instruments, — the mortgage made by the railroad company, the mortgage made by the county, and the trust deed made by the county. All these instruments were parts of one general scheme for the raising of funds to build a railroad through the county (Scates *v.* King, *supra*); but the mortgage executed by the railroad company was intended more particularly to cover the right of way, franchises and rolling stock. If the court erred in rendering two decrees of foreclosure, instead of one, it was an error for which the foreclosure proceeding cannot be collaterally attacked.

After the decree or order of 1868, the cause was regularly continued on the docket, until the final decree was entered under which the land was sold. It has been said that, in order to prevent a suspension of *lis pendens*, there must be a "full" or continuous prosecution of the suit. But the rule in reference to a continuous prosecution simply requires that there shall be no such neglect in the prosecution as cannot be explained and appears to be inexcusable. Mere lapse of time does not indicate such negligence. If the cause finally goes to decree or judgment, it will be presumed, in the absence of any showing that there has been a negligent intermission of the prosecution, that there has been a binding *lis pendens*, and that interveners *pendente lite* are bound by the decree or judgment. As a general rule, there will be no estoppel against the right to enforce the *lis pendens*, unless the plaintiff or complainant in the suit has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned. Benn. Lis Pend., pp. 173, 180; 13 Am. & Eng. Enc. Law, pp. 889–891. In the present case we find nothing in the record to show that there was any such negligence in the prosecution of the foreclosure suit as to overcome the presumption of a binding *lis pendens*.

It is still further insisted by the appellant that by reason of the amended bill filed on January 17, 1870, a new *lis pendens* was created from that time, which could not affect the interests acquired by the grantee in the previous deed of 1868. There are cases where the *lis pendens* will begin with the filing of the amendment, and will not relate back to the commencement of the action, so as to affect intervening rights. This, however, is only true where the amendment sets up a new equity, or where the party making the amendment brings forward a new claim, or a different and distinct ground of relief, not before asserted. Benn. Lis Pend., pp. 97, 160; Tilton *v.* Cofield, *supra;* Bank *v.* Sherman, 101 U. S. 403; Stoddard *v.* Myers, 8 Ohio, 203; Gibbon *v.* Dougherty, 10 Ohio St. 365; Lumber Co. *v.* Gustin, 54 Mich. 624; 20 N. W. 616; 1 Freem. Judgm., § 199; Bradley *v.* Luce, 99 Ill. 234; Connelly *v.* Stone, 1 Metc. (Ky.) 652; Worthom *v.* Boyd, 66 Tex. 401; 1 S. W. 109. Purchasers *pendente lite* must take notice of everything averred in the pleadings, pertinent to the issue or to the relief sought. Center *v.* Bank, 22 Ala. 757; Allen *v.* Poole, *supra;* Wortham *v.* Boyd, *supra;* 13 Am. & Eng. Enc. Law, p. 886. The only new matter to which counsel refer as being set up in the amended bill of 1870 is the contract between the county and Vanduzer, Smith & Co. to build a railroad through the county, etc. Kenicott *v.* Supervisors, *supra;* Scates *v.* King, *supra.* No relief was asked under the contract.

No new cause of action was set up different from that stated in the bills of 1865 and 1866. The contract was simply evidence of the power of the county to execute the mortgage and trust deed. The bills already filed had alleged the execution of the mortgage by the county, in pursuance of an order of the county court for the purpose of aiding in the construction of a railroad, and had asked for a foreclosure of the mortgage. Such, also, was the scope and character and prayer of the bill of 1870. The mere pleading of a matter of evidence did not change the essential features of the case made by the bills already filed. We do not think that there was anything in the amendment of 1870 which prevents the *lis pendens* from relating back to the filing of the amended bills in 1866, and subjecting the interest acquired by the deed of 1868 to the operation of the foreclosure decree.

Counsel for appellant urge upon our attention various reasons why the complainants in the foreclosure suit were chargeable with notice of the execution of the deed of 1868 and of the rights of those holding under it. Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives title, but "the litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit." 1 Story Eq. Jur., § 406. He is not a necessary party, because his vendor or grantor remains as the representative of his interests, and the plaintiff or complainant may ignore his purchase, and proceed to final decree against the original parties. Edwards *v.* Norton, 55 Tex. 405; Smith *v.* Hodsdon, 78 Me. 180; 3 Atl. 276; Carter *v.* Mills, 30 Mo. 437; Steele *v.* Taylor, 1 Minn. 274 (Gil. 210); 13 Am. & Eng. Enc. Law, pp. 900, 901. It is therefore immaterial whether the complainants in the foreclosure suit had notice of deed of 1868 or not.

Counsel for appellant relies upon payment of taxes and possession for seven successive years, under the deed of 1868, as color of title. This statute could not be invoked against the complainants in the foreclosure suit by the county of Wayne or its grantee during the pendency of the suit. While the relation of mortgagee and mortgagor continues, neither party in possession can interpose the statute of limitations as a defense against the other. The statute can only commence to run after that relation has been terminated in some of the modes known to the law. Rockwell *v.* Servant, 63 Ill. 424. The mortgagor cannot defeat the mortgagee's right of action by retaining possession and paying taxes for seven successive years; and it is as much the duty of a grantee of the mortgagor, receiving his possession from the mortgagor, to pay the taxes upon the property,

as it is the duty of the mortgagor himself to do so. The limitation law of 1839 has no application to such a case. Hagan *v.* Parsons, 67 Ill. 170; Palmer *v.* Snell, 111 Ill. 161. Nor does the statute of limitations run in favor of a purchaser *pendente lite*. Such a purchaser in possession of land so purchased will not be regarded as holding it adversely to the parties to the suit during the litigation. Lynch *v.* Andrews, 25 W. 751. In the present case the sale under the decree of foreclosure was not made until September 18, 1877, and the time of redemption did not expire until December 18, 1878. Not until the latter date was the purchaser under the foreclosure decree entitled to a master's deed, nor until that date could the mortgagor or his grantee assert an adverse possession. Emmons *v.* Moore, 85 Ill. 304; Lehman *v.* Whittington, 8 Ill. App. 374. The proof does not show a payment of taxes for seven successive years, after December 18, 1878, or after September 18, 1877, by the grantee in the deed of 1868, or by any of the parties holding under that deed. We cannot discover that appellant or any of his grantors have acquired title under the limitation law, which provides for possession and payment of taxes for seven successive years under color of title.

The considerations already presented dispose of the claim that title was acquired under the first section of the limitation law in regard to possession for 20 years. Whatever possession the grantee in the deed of 1868, or those holding thereunder, may have had during the period of 10 years from 1868 to 1878, whether such possession is claimed under the 7-years limitation, or under the 20-years limitation, was not adverse to the mortgagees prosecuting the foreclosure suit against the county, but was subordinate to their rights. After deducting the time during which the foreclosure suit was pending, there was no adverse possession for 20 years by appellant or any of his grantors, near or remote. The proof does not show any such possession as meets the requirement of the statute in regard to 20 years' possession. Where the possession of land alone is relied upon for any legal purpose, in the absence of paper title, it should be a *pedis possessio*, — an actual occupancy of the premises in question, — and not a mere constructive possession. Webb *v.* Sturtevant, 1 Scam. 181; Illinois Mut. Fire Ins. Co. *v.* Marseilles Manuf'g Co., 1 Gilman, 236; Medley *v.* Elliott, 62 Ill. 532; City of Champaign *v.* McMurray, 76 Ill. 353; Schneider *v.* Botsch, 90 Ill. 577. Under the first section of the limitation law, which provides that real actions for the recovery of land must be brought within 20 years, etc., no deed or paper title is necessary; it is sufficient to take possession under a claim of

ownership. Weber *v.* Anderson, 73 Ill. 439; Shaw *v.* Schoonover, 130 Ill. 448; 22 N. E. 589. The judgment of the circuit court is affirmed. Affirmed.

Rehearing denied.

Adverse Possession in Case of Joint Tenancy — Effect on Remainder.

Watkins *v.* Green, 101 Mich. 493; 60 N. W. 44.

Opinion by GRANT, J.

The defendant executed to plaintiff a warranty deed of certain lands. This action is brought to recover for legal breaches of the covenant of warranty. The title to the property was originally in one Toussaint L'Esperance, who died intestate in 1842, leaving a widow and six children. He bequeathed one-third of the land in fee to his widow, and a life estate in the remainder. Upon the termination of the life estate the two-thirds were bequeathed in equal shares to his six children. Prior to 1853 the land had been unoccupied, except that the timber had been removed. In October, 1850, the entire land was sold for the taxes of 1848, and was again sold in October, 1851, for the taxes of 1849. October 21, 1851, the auditor general issued his deed to Edward Meyers upon the first sale, and on November 16, 1852, a second deed upon the sale of 1851. The first sale was to one Williams, who assigned to Meyers. The second sale was direct to Meyers. Two of the children died, leaving no issue. One is dead, leaving one child, and three are still living. The widow died May 2, 1887. July 19, 1851, Meyers obtained by quitclaim deed the interest of Edward, one of the six children, who was the owner of an undivided one-ninth. May 23, 1854, the widow and two of the children quitclaimed their interests to one Nathan H. White, who, on July 1st of the same year, conveyed the land by quitclaim deed to one Daniel Ball. Ball deeded to one Boltwood in 1857. June 4, 1858, the interests of two of the other children passed by guardian's deed to one Dow, who in turn conveyed these interests to Boltwood. October 3, 1853, the entire land was sold for the taxes of 1851 and 1852. Two deeds were issued upon these sales to one Stevens, who, on July 2, 1855, conveyed the interest acquired by these deeds to Ball. Ball conveyed to White, and the tax titles passed to Boltwood under deed from White already referred to. May 17, 1887, Boltwood conveyed to James B. Judson. In 1886 Judson purchased the interest of the two

remaining heirs of Toussaint L'Esperance. There is no competent evidence that Meyers ever went into possession of the land, or was intrusted with its care and supervision, either by L'Esperance or his widow. The only testimony upon this subject is given by one of the children of L'Esperance, who testified to his understanding from conversations he had with his mother. Such testimony was hearsay and incompetent. July 4th, 1853, Meyers conveyed the entire land to one John Hanley by warranty deed. The land was then in the state of nature, except that the timber had been removed, and was covered with water and willows. Hanley immediately went into possession with his family, drained and fenced it, and the following year built a house, barn and other buildings upon it, and continued in such possession until he conveyed by warranty deed to defendant, Green, October 13, 1879; meanwhile paying the taxes and cultivating and improving the land. Green executed a warranty deed to plaintiff, Watkins, January 2, 1881. Green occupied the land, through tenants, until the conveyance to plaintiff. Mr. Judson commenced an action of ejectment against the plaintiff, who notified defendant of Judson's claim, and demanded that he defend the suit. This defendant refused, claiming that he had a good title by adverse possession. Plaintiff then purchased the interests held by Judson, and brought this suit. The court below directed a verdict for the defendant, holding: "(1) That John Hanley went into possession of the property in dispute under a claim of title, *i. e.*, the Meyers tax deeds and his deed from Meyers, and that under his claim he held an open, notorious, hostile, distinct, and adverse possession for over twenty years. (2) That, of the 'patent title,' defendant obtained one-ninth by his deed from Meyers. (3) That the statute of limitations had run in favor of Hanley and his successors, against the widow, as to the three-ninths willed to the widow absolutely. (4) That there was a merger of the life estate and the three-ninths of the estate obtained from Enos, Philip and Charles, and passing to Boltwood on June 12, 1860, and that the statute of limitations had run against the three-ninths, in favor of Hanley and his successors. (5) That the Sears Stevens tax titles were paramount titles, and, when purchased by Ball, extinguished the two-ninths of the patent title still held by Elizabeth Crouch and Josephine Page, and the right of entry accrued at once to Boltwood, and that the statute of limitations had run against the entire patent title, in favor of Hanley and his successors. (6) That the tax titles purchased by Meyers were paramount to the title of the children and that of the widow, and that Hanley's possession

under the paramount title extinguished the title of the widow and children to the property in question.

Meyers, at the time of the purchase of his one-ninth interest from Edward L'Esperance, was not in possession, nor did he take possession either under that deed or his tax deeds. He occupied no relation of trust or confidence towards the widow and the heirs. He was therefore under no obligation to pay their taxes, or to buy up outstanding interests or titles for their benefit. Hanley went into possession under his warranty deed from Meyers, claiming the entire title, and under a deed which purported to convey the entire and absolute fee. It cannot be said that he accepted this deed charged with any duty to protect the life estate, or the undivided interests of any of the tenants in common. Hanley's possession at once became open, notorious, hostile, and exclusive to all claiming any interest in the land. That possession continued in Hanley and his grantees for nearly forty years, and more than twenty years after the minor children became of age. It is established in this State that one who purchases an undivided interest in lands, and enters as a stranger to the rights of his cotenant, is not estopped from setting up against them an adverse title that originated before his purchase. Blackwood *v.* Van Vleit, 30 Mich. 118; Campau *v.* Dubois, 39 Mich. 274; Sands *v.* Davis, 40 Mich. 14.

Such entry operated as an ouster of all those having an interest in the land and the right of entry. The widow was then entitled to the possession of one-third by virtue of her one-third ownership, and to the possession and enjoyment of the other two-thirds by virtue of her life estate. Clearly, therefore, her acts and those of her grantee of these two interests, were lost by adverse possession, and the title vested in the defendant.

When Ball purchased the interest of the widow and one of the children, and the tax titles for the taxes of 1851 and 1852, which were then outstanding, all these titles became merged in him. He was then entitled to possession, as against Hanley. The right of entry became complete, and the statute of limitations began to run. By the deed from Ball to White, dated in 1856, and from White to Boltwood, in 1857, Boltwood succeeded to the same rights and interests, and was entitled to possession. Boltwood, by his purchase of the interests of Enos and Philip in 1858, became possessed of the entire title, including the life estate, except the one-ninth purchased by Meyers and the two-ninths outstanding in Josephine and Elizabeth. He took no steps to enforce his rights, and the defendant, by the adverse possession of himself and his grantors, obtained title to all the interests owned by Boltwood. Boltwood, being the owner of the

life estate, was obligated to pay the taxes, and protect the interests of the remainder-men. If he chose to permit Hanley and his grantees to remain in adverse and undisturbed possession till such possession ripened into a valid title, neither he nor his grantees can now separate his interests, under the plea that, as to some of the interests, he had not the right of entry.

Josephine and Elizabeth, or their grantees, acquired no right of entry until the death of their mother, in May, 1887, when the life estate terminated. How. St., § 8700. As to these interests, therefore, there has been no adverse holding, so as to convey title. Cook *v.* Knowles, 38 Mich. 316; Marble *v.* Price, 54 Mich. 466; 20 N. W. 531.

If, therefore, the tax deeds to Meyers are void, there was a breach of the defendant's covenants of warranty, for which the plaintiff is entitled to damages. Of course, if the tax deeds obtained by Meyers are valid, they cut off the entire title of the widow and heirs. Where the owner of the life estate neglects to pay the taxes assessed upon the land, and they are sold under valid taxes and valid proceedings, the title passes to the grantee, and the only remedy of the remainder-men is against the life owner. Judgment must be reversed, and a new trial ordered. The other justices concurred.

Possession Must Be Continuous Throughout the Statutory Period of Limitation — Temporary Absence No Abandonment of Possession.

Downing *v.* Mayes, 153 Ill. 330; 38 N. E. 620.

Craig, J. This was a petition for partition, brought by Caroline Mayes, who was formerly the widow of William R. Strickland, and the heirs of Strickland, for partition of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 31, and N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, section 33, township 17, range 12 W., in Cass County. Jennie Mayes and Finis E. Downing were made defendants to the petition. William R. Strickland died in March, 1870, and it is claimed that he owned the two tracts of land at the time of his death, and that the lands then descended to his widow and children. As to the west 40-acre tract in section 31, there is no controversy. The west 40 in section 32 belonged originally to one Benjamin Newman, and the defendant, Finis E. Downing, claims title to that tract under deed from the widow and the heirs of Newman, executed in April, 1892, while, on the other hand, petitioners claim that William R. Strickland entered into the open, notorious, adverse possession of the land in the spring of 1866, claiming as owner,

and continued in such possession until his death, in 1870, and that his widow and heirs (petitioners) have continued in such adverse possession ever since, — a period of over 20 years. On the hearing the court held that petitioners, under the evidence, established title under the 20-year statute of limitations, and entered a decree according to the prayer of the petition.

It appears from the evidence that in the spring of 1866, William R. Strickland bought the 40 in question from Benjamin Newman, and the 40 adjoining it on the west from one Wagner. He obtained a deed from Wagner, but the evidence fails to show any deed of contract in writing of any character from Newman. What the contract between Newman and Strickland really was is not disclosed by the evidence in this record. At the time the land was of little value, being all flat, swampy land, and being subject to overflow, except five or six acres, which was a sand ridge. The fact that the land at the time was worth so little may have been the reason the parties did not take the trouble to reduce their contract to writing. But, however that may be, it does appear that in the spring of 1866 William R. Strickland entered upon the land, claiming to be the owner by purchase. He built a small house, stable, hogpen, smokehouse, and inclosed the entire 80 acres, with other lands. Strickland occupied the land until he died, in 1870. After his death his widow and children continued to occupy the place until the widow married a man named Mayes, in 1877, who resided on land adjoining. After her marriage she and her children continued to cultivate the land until the spring of 1883, when her husband moved to Kansas. Before leaving for Kansas the widow placed her son-in-law, Powers, in the possession of the land, and he farmed it in 1883 and 1884. In the fall of 1884 Powers moved to Kansas, and Mrs. Strickland returned to the neighborhood where the land is located, and made repeated efforts to lease it for the year 1885, but, owing to the water on the land, she was not able to procure a tenant. In the spring of 1885 she made a further effort to rent the land, but was unable to do so. In 1886 and 1887 she attempted to find a tenant for the place, but, owing to the wet seasons, she was unable to procure a tenant. The land was not leased or farmed during the seasons of 1885, 1886, and 1887; but in February, 1888, a man named Mayes rented the land from the widow, and occupied it from March until December, when he turned it over to Jane Mayes, who has continued to occupy the land ever since.

It is well settled by the authorities that, where an adverse possession is relied upon to defeat the title of the owner of lands, the possession must be hostile in its inception, and so

continue without interruption for the period of 20 years. It must be an actual, visible, and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner. The possession need not, however, be under a rightful claim, or under a paper title. Turney *v.* Chamberlain, 15 Ill. 273. Strickland entered into possession of the land claiming as owner. He inclosed the land with other lands, by a fence. He erected a house, and resided on the land with his family. He reduced the land to cultivation. From the evidence it is apparent that the possession of Strickland was adverse, actual, visible, and exclusive, acquired and held under claim of title inconsistent with the true owner, and the only question of any serious difficulty is whether the possession was continuous for a period of twenty years. If during the period relied upon the possession was abandoned by Strickland or his heirs, the statute would cease to run from the time of such abandonment, and a subsequent reentry would not be available to establish a continuous possession. When the possession is lost or abandoned, the seisin of the true owner may be regarded as restored, and a subsequent entry constitutes but a new disseisin, and the statute would only begin to run from the new entry. What constitutes actual possession depends to a great extent upon the nature of the land and the use or uses to which it may be put. In Brooks *v.* Bruyn, 18 Ill. 542, it is said: "As a general rule, it is sufficient if the land is appropriated to individual use in such manner as to apprise the community or neighborhood of its locality that the land is in the exclusive use and enjoyment of another." Same rule was declared in Kerr *v.* Hitt, 75 Ill. 51. In Coleman *v.* Billings, 89 Ill. 188, it is said: "It is true, appellee testifies that there were some periods of time when no one claiming under Miller or herself was actually residing upon the land; but actual residence, either by the party claiming or a tenant, is not indispensable to continue possession or occupancy. If there is a continuous dominion, manifested by continuous acts of ownership, it is sufficient." In Clements *v.* Lumkin, 34 Ark. 598, in discussing what constituted a possession of lands, the court said: "The possession of Topp's vendee, once established by material acts of visible notorious ownership, which was done by putting negroes upon it, and making a deadening, long known afterwards as the Lumkin deadening, must be presumed to have continued, until open, notorious, and adverse possession be shown to have been taken by another." In Hughes *v.* Pickering, 14 Pa. St. 297, the following language of the judge at *nisi prius* seems to have been approved: "In order to destroy the continuity of possession, the vacancy must not be merely occa-

sional, such as occurs in every case where a party, for some cause, unable to obtain a tenant, shuts up his property for a short time, or indeed for a long time." In Stettnische *v.* Lamb, 18 Neb. 619; 26 N. W. 374, the court says: "When a party erects a building on a lot, and takes actual possession of the same as his own, the fact that afterwards he, or those claiming under him, rent the property, or in case it is unoccupied, have and claim the right of possession, * * * where there is no abandonment, is not an interruption to the possession. De La Vega *v.* Butler, 47 Tex. 529. The reason is, the building, at least, belongs to the claimant. He may use it in any manner he sees fit, and so long as no one enters into possession thereof, claiming adversely to him, his possession is not interrupted. And, possession being once established in Mrs. Towle by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have been continued until an interruption therein is proved. Rayner *v.* Lee, 20 Mich. 384." In Crispen *v.* Hannaven, 50 Mo. 536, there were several "breaks," so-called, when no one was actually cultivating the premises, the longest of which was "from about 1861 or 1862 to 1865 or 1866." In discussing the charge to the jury as to what would constitute such a break as would destroy the possession, the court says: "It might have been inferred that living off the premises, a failure to cultivate them for a year or more, for whatever reason, would constitute such a break. Nothing would be more erroneous. While an abandonment of the premises would so break the possession of him who has occupied that the constructive possession of the true owner will attach, and thus save his right of entry, every failure to cultivate the field for a season, or a delay in repairing the fences when destroyed, will not be held to be an abandonment, if sufficient reason appears."

From the spring of 1866 to the fall of 1884, it is plain that Strickland and his widow and heirs held the continuous possession of the land; and if under the facts, the possession was continued in the widow and heirs from the fall of 1884 until the spring of 1886, the bar of the statute would be complete. There is no evidence in the record that the widow and heirs intended to abandon the possession of the land, but, on the other hand, when Powers moved away, in the fall of 1884, the widow came to the premises, and tried to find a tenant. Again, in the spring of 1885, she made an effort to find a tenant, but failed, on account of the wet season. After Powers left, in the fall of 1884, the land remained fenced. The buildings were all left on the land. Nothing was done to indicate an abandonment. Under such cir-

cumstances, did the widow and heirs lose the possession of the premises, or did the possession still remain in them, although they had no tenant during the year 1885 or 1886? During the year 1885, and down to the spring of 1886, the improvements made by the Stricklands all remained on the land. The house had been damaged somewhat by hunters, but it remained on the land. The fence put upon the land to inclose it still remained. The possession of the Stricklands had not been disturbed. No person attempted to enter upon the land or invade the possession of the widow and heirs of Strickland. We think, therefore, that down to the spring of 1886 the widow and heirs of Strickland were in the possession of the land, although they were not on the land in person, and did not have a tenant thereon. Suppose a person owns a tract consisting of 40 acres of land. He incloses the land with a fence, erects a house, and resides upon the land for several years. He finally concludes to change his residence, and moves to another place, but for some reason he is unable to procure a tenant. His house remains vacant for three or four years, and the land is not cultivated. Does the owner, from the fact he cannot find a tenant for his land, lose the possession? We think not. If the widow and heirs had abandoned the possession of the premises, or had some other party gone into the actual possession, under a claim of right, before the 20 years had expired, there might be good ground for holding that the complainants were not entitled to invoke the statute of limitations, but such was not the case. Moreover, the owner of the title lived until 1880, and while he knew that the Stricklands were in the possession of the land claiming to own it, he never, so far as appears, set up any claim to the land, nor did his heirs set up any claim after his death. On the other hand, the Stricklands were allowed to hold the possession of the land for over 20 years without objection from any quarter. Under the facts, we think it is plain that the decree of the court in favor of the Stricklands was correct.

It has been suggested in the argument that Strickland entered under a contract of purchase from Newman, and, having entered under that title, his possession was not adverse. A sufficient answer to this position is that the record fails to show contract, of any description, ever made or entered into between Newman and Strickland, in regard to the sale or purchase of this land. No writing was produced, nor was it proven that one ever existed. Moreover, the evidence fails to show even a verbal contract for the sale of the land from Newman to Strickland. Some loose declarations of the widow were proven, but they do not make out a contract. But, if they did, the declarations of the widow

could not be held as binding on the heirs of Strickland. After a careful examination of the entire record, we think the decree of the circuit court correct, and it will be affirmed. Affirmed.

Taking of Adverse Possession by Successive Disseisors to Make up the Statutory Period of Continuous Adverse Possession.

Filsom *v.* Simshauser, 130 Ill. 649; 22 N. E. 835.

Baker, J. This was ejectment against the appellants, Matthew Faloon and Thomas F. Tipton. The premises in controversy were a strip of ground beginning at the southwest corner of lot 1, in White's addition to the town, now city, of Bloomington, and running thence north to the north line of said lot; thence west 29 feet; thence south to the north line of Grove street; and thence east 29 feet to the place of beginning. The appellant Tipton exhibited at the trial a title in himself, through mesne conveyance, from the government of the United States. The important matter in controversy is whether his right of possession has been barred, in respect to the rights of appellees, by the operation of the statute of limitations, which tolls after 20 years of adverse possession, the right of action for the recovery of lands and the right to make an entry thereon. Lot 6, in Gridley's addition to Bloomington, lies west of lot 1, in White's addition to Bloomington, and this strip of ground now in question, 29 feet wide, lies between them. In 1852 one Jesse Adams was in possession, under paramount title, of the east half of lot 6, of 56 feet off of the west side of lot 1, and of the strip of 29 feet, and fenced all these pieces of land in one inclosure, and erected a brick house on the strip in dispute; that being about the center of the combined premises. He remained in possession until September 7, 1858, when he executed a deed to Allen Withers, in which the premises conveyed were described as the east half of lot 6, in Gridley's addition, and 56 feet off of the west side of lot 1, in White's addition, and put said Withers in possession of the house, and of the whole of the premises. Withers retained possession of the entire inclosure, occupying it by his tenants, and claiming to be the owner of it all until his death, in 1864. He left a will by which he devised his whole estate to his wife, Sarah B. Withers. Mrs. Withers occupied the entire premises by her tenants, she claiming to be the owner of the same until August 8, 1871, when she conveyed by deed to "Hanna Simshauser and her children, * * * and their heirs and assigns." This deed also described the premises conveyed as the east half

of lot 6, in Gridley's addition, and 56 feet off of the west side of lot 1, in White's addition. Mrs. Withers put her grantees into possession. Mrs. Withers states in her testimony that the house and premises were occupied by a tenant when she made the deed; that she turned over the lease to Mrs. Simshauser; that the latter collected rent from the tenant therein; that Mrs. Simshauser rented the place for two or three years, until the house was torn down, and that the Simshausers then rented the land for a garden, or something of that kind; that Mr. Funk had a garden there, and paid the taxes.

It seems, from the evidence, that the house having become somewhat dilapidated, Philip Simshauser, husband of Hannah Simshauser, had it torn down about 1874. The husband in his testimony, in response to a question as to what his wife and children did with the house after Mrs. Withers deeded it to them, answered: "We had it about two years, and we had so much bother about tenants paying the rent, and it wanted fixing up, so, after we looked it over, I tore it down." He also states that after the house was torn down his boys took the matter out of his hands, and had the premises rented for a garden; and that nobody except them (the Simshausers) were in possession of or made any claim to the premises, until the claim made by appellant Faloon, in 1885. We think it evident, from this testimony, that whatever possession Philip may have had or authority he may have exercised in respect to the house, and the land connected therewith, was merely in behalf of his wife and children, and in assertion of their claims of title and in conformity with their relative interests as supposed to be fixed by the deed they held, and in no sense under claim of a personal and individual right in himself. It is also manifest that the consecutive possessions of the strip of ground 20 feet wide, held by Mr. Withers, Mrs. Withers, and the grantees, in the conveyance of August 8, 1871, were supposed to be under and by virtue of the deeds made by Adams and by Mrs. Withers, respectively.

Appellant Tipton's title is derived through a quitclaim deed for the 29 feet, dated October 4, 1876, made by Jesse Adams to appellant Faloon, and a warranty deed from Faloon to himself, dated April 15, 1887. A possession of land, in order to be adverse, need not be under any muniment of title. Adverse possession is a possession inconsistent with the right of the true owner, and depends upon the intention with which it is taken and held; and an actual occupancy of land by one, accompanied by acts of ownership inconsistent with the fact of ownership in another, is presumptively adverse possession. The possession

of Allen Withers, and that of his devisee, Sarah B. Withers, were very plainly adverse, in respect to the 29 feet, to the title of Jesse Adams, under which appellants claim, and these possessions continued from September 7, 1858, to August 8, 1871, — a period of 12 years and 11 months. So, also, the possession of appellees, under their deed from Mrs. Withers, was manifestly adverse to the title of which appellants seek to avail themselves; and it extended from August 8, 1871, until some time in the year 1885, — a period of almost or quite 14 years. It is not essential there should be proof of oral declarations of claim of title made by appellees, but it is sufficient if it appears they so acted as to clearly indicate that they did claim title. James *v.* Railroad Co., 91 Ill. 554. It follows that, if these possessions can be tacked together, there is an adverse possession shown in this case of some 27 years, and the bar of the statute against the title of appellants, even though it be the true title, is complete and became absolute in September, 1878.

Appellant urges, however, that where several persons, without privity of estate, successively enter on land as disseisors, their several possession cannot be tacked so as to make a continuity of disseisins, and that, in order to give a right to the bar under the statute of limitations, a party seeking to avail of such right must show privity of estate with the prior disseisors by purchase and conveyance of disseisin. It is a sufficient answer to this claim, and to the authorities cited, to show it is essential to establish by a deed that appellees are connected with the adverse possessions of Allen and Sarah B. Withers, to say that the question is not an open one in this State, and that the rule having been years ago determined otherwise by this court, and it being a rule of property upon which many titles may depend, such ruling will be adhered to without any re-examination of the conflicting authorities in respect thereto. In Weber *v.* Anderson, 73 Ill. 439, it was held that a deed is not necessary to transfer the possession of land held adversely to the owner, and that where land is held adversely by different occupants, and one succeeds to the possession of another, the identity and continuity of their possession, in order to make the period required to bar the owner, may be shown by parol evidence. See, also, Schneider *v.* Botsch, 90 Ill. 577, and other cases there cited.

Appellant Tipton further insists that he is an innocent purchaser for value from a person in possession having the legal title of record, and should be protected as such. Waiving the contention made by appellees that this claim is wholly unsustained by the facts, it would seem that, even if it has a sufficient

basis in the evidence, yet it cannot here prevail. While the statute of limitations does not have the effect to transfer the title of the true owner, it does transfer his right of possession to the party in adverse possession for the required period. In Hinchman *v.* Whetstone, 23 Ill. 185, this court said: "Where the statute has tolled both the right of entry and the right of action, the remedy of the owner is gone, and he is precluded from asserting his right, or setting up his title against the party relying upon the statutory bar." And further said: "As against such occupant, and those claiming under him, he can neither use his title for the purpose of recovery or defense, until he shall have destroyed the bar by purchase, limitation, or some other mode equally effectual." When both the right of entry and the right of action are lost, then by operation of the statute the party in adverse possession is conclusively presumed to be the owner, and to be vested with title, and such title cannot be cut off and destroyed by the act of the holder of the former title in regaining possession by the commission of a tort, and, while so in tortious possession, conveying to a third party who had no notice of the adverse title, the holder of which has been wrongfully and temporarily dispossessed. The right of possession which once was in the former owner having been transferred by the statute to the new and adverse owner, such former owner is powerless to convey to the purchaser from him a right of possession which he himself does not have. The appellant Faloon took possession after the rendition of judgment in the first ejectment suit, hereafter mentioned, but he was not put in possession by any writ of possession issued upon such judgment. In Riverside Co. *v.* Townsend, 120 Ill. 9; 9 N. E. Rep. 65, this court held that when a plaintiff in ejectment shows an adverse possession for 20 years, so that the entry is barred, he is entitled to recover even against a defendant whose possession for a less period, is lawful; and quoted with approval the language from Ang. Lim., § 381, that "it is also unquestionable that, where land has been held under a claim to the fee, for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed, by an ejectment brought by him who has so held and claimed."

The declaration filed in this case contains 10 counts. In the first count Hannah Simshauser, Philip Simshauser, Allen W. Simshauser, Lawrence Simshauser, Benjamin F. Simshauser, Peter B. Simshauser, Mary Belle Simshauser, Sarah W. Simshauser, and Henrietta Simshauser claim the whole of the premises in fee. In the second count Hannah Simshauser claims an undivided one-eighth part of said premises; and in the third,

fourth, fifth, sixth, seventh, eighth, ninth, and tenth counts, respectively, Allen W., Lawrence, Benjamin F., Peter P., Mary Belle, Sarah W., Henrietta, and Clarence Simshauser, each, respectively, claims an undivided one-eighth part of said premises. It seems from the evidence that in 1885 the appellant Faloon commenced ejectment for the recovery of the premises in dispute against one Funk, who had rented them from Benjamin F. Simshauser, and said Funk gave due notice to said Benjamin F. of the suit, and in the suit Faloon obtained judgment by default. In the present suit, which was tried before the court without a jury, the court held that Benjamin F. Simshauser was barred by the judgment in the first ejectment, and as to him the judgment was that he take nothing by the suit. But the court found the issues for the plaintiffs Hannah, Allen W., Lawrence, Peter P., Mary Belle, Sarah W., and Clarence Simshauser, and that each of said last-named plaintiffs was the owner in fee-simple of an undivided one-eighth part of the premises, and rendered judgment that each of them "do each severally recover * * * an undivided one-eighth of the above-described premises," etc.

It is strenuously urged the judgment in favor of Clarence Simshauser for an undivided one-eighth of the land is erroneous, and such contention is undoubtedly well founded. The deed from Mrs. Withers was, as we have heretofore seen, to Hannah Simshauser and her children. While it is necessary that all the grantees should be sufficiently described in a deed, yet that rule does not require such parties should be designated by the usual method of giving their names in full, and any other description will suffice which distinguishes them from all others, as where one is described by his office or by his relation to other persons. 5 Amer. & Eng. Cyclop. Law, 432, and authorities cited in notes; Cook *v.* Sinnamon, 47 Ill. 214; Low *v.* Graff, 80 Ill. 360. In this case Mrs. Withers and her children living at the time the deed was executed and delivered took as tenants in common. Wilds Case, 6 Coke, 17; Parkman *v.* Bowdoin, 1 Sum. 366; 2 Jarm. Wills, 224.

The evidence of Philip Simshauser shows that the seven children of himself and wife living at the time Mrs. Withers made the deed were Allen W., Lawrence, Peter P., Mary Belle, Sarah W., Henrietta, and Benjamin F. The evidence of Mrs. Withers is to the same effect, and it clearly appears from her testimony that Clarence was born about three years thereafter. Of course Clarence did not take by the deed. In case of a grant of an immediate estate in possession, the grantee must be *in esse*, and a deed of that kind may be avoided by showing the grantee came

into being subsequent to the delivery of the deed. Hulick *v.* Scovil, 4 Gilman, 159; Miller *v.* Chittenden, 2 Iowa, 368; Tied. Real Prop., § 797. The finding and judgment of the court in favor of Clarence Simshauser for an undivided one-eighth part of the premises was clearly erroneous. Section 27 of the ejectment act (Rev. St. 1874, c. 45, § 27) provides "it shall not be an objection to a recovery in any action of ejectment that any one of several plaintiffs do not prove any interest in the premises claimed, but those entitled shall have judgment, according to their rights, for the whole or such part or portion as he or they might have recovered, if he or they had sued in his or their name or names only." And it is provided in the second and sixth clause of section 30 of the same act that if it appears that one or more of the plaintiffs have a right to the possession, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant; and that, if the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest. In this case there is no cross-error assigned by Henrietta Simshauser, because there was no finding and judgment in her favor for an undivided one-eighth of the land. It is not perceived that there is any occasion for reversing the entire judgment and remanding the cause. The findings and judgments in respect to the interests of the several appellees were several and distinct. The judgment in favor of Clarence Simshauser being erroneous, and he having no right or title in the premises, is reversed. The judgments in favor of Hannah Simshauser, Allen W. Simshauser, Lawrence Simshauser, Peter P. Simshauser, Mary Belle Simshauser, and Sarah W. Simshauser are affirmed. It is ordered that six-sevenths of the costs of this appeal be taxed to appellants, and one-seventh of such costs be taxed to Clarence Simshauser. Affirmed in part, and reversed in part.

Estoppel by Deed.

Pike *v.* Galvin, 29 Me. 183.

Shepley, J. The title of both parties to the demanded premises is derived from Artemas Ward, who by his agent Robbins made a contract in writing, on October 26, 1820, to convey a tract of land including the premises to Theodore Jellison upon the performance of certain conditions therein stated. Jellison appears to have entered into possession, but does not appear to have performed the conditions. On July 7, 1823, Jellison

assigned that contract to the demandant, and on the same day made a deed of release, purporting to convey the same tract of land to the demandant. Artemas Ward on October 27, 1825, by a deed containing covenants of warranty, conveyed a larger tract of land including the tract before named, to Jones Dyer, Jr., who, on July 11, 1829, conveyed to Theodore Jellison the tract of land described in his deed to the demandant. Jellison, on May 9, 1833, conveyed the premises demanded to Stephen Emerson. These conveyances were all duly recorded. The defendant is the tenant of Joseph Wyeth and Stephen G. Bass, who have exhibited a title derived from Stephen Emerson. The demandant has never been in possession of the land described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison have always been in possession.

As Jellison had no title when he made his deed on July 7, 1823, the demandant can have none, unless that acquired by Jellison on July 11, 1829, inured to him.

The deed from Jellison to the defendant contains no covenants but the following, "so that neither I, the said Jellison, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will by any way or means have, claim, or demand any right or title to the aforesaid premises or to any part or parcel thereof forever."

Without entering upon a discussion of the doctrine or the different aspects of it presented in the very numerous cases, which have been decided respecting the effect of covenants contained in a conveyance of land, to transfer to the vendee by inurement, estoppel, or otherwise, a title subsequently acquired, it will be sufficient for the present purpose, to state a couple of positions, which appear to have been asserted or admitted in many of them.

1. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it.

Such is the doctrine in this State: White *v.* Erskine, 1 Fairf. 306; Lawry *v.* Williams, 13 Maine R. 281; Baxter *v.* Bradbury, 20 Maine R. 260.

In New Hampshire: Kimball *v.* Blaisdell, 5 N. H. R. 533.

In Vermont: Middlebury College *v.* Cheney, 1 Vermont R. 336.

In Massachusetts: Somes *v.* Skinner, 3 Pick. 32; White *v.* Patten, 24 Pick. 324.

In New York: Jackson *v.* Matsdorf, 11 Johns. R. 91; Jack-

son *v.* Bradford, 4 Wend. 619; Pelletreau *v.* Jackson, 11 Wend. 110.

In Ohio: Hill *v.* West, 8 Ham. 222.

In the Courts of the United States: Terrett *v.* Taylor, 9 Cranch, 23; Mason *v.* Muncaster, 9 Wheat. 458; Stoddard *v.* Gibbs, 1 Sum. 263.

Against these and other decisions to the same effect it has been contended, that "the old common-law warranty has no practical operation under the system of conveyancing employed in this country, except in the single case of release with warranty, to a party in adverse seisin of an estate, and of a subsequent descent of the right of entry or action to the warrantor." And that "the doctrine of estoppel in deeds cannot be based upon that of warranty." Doe *v.* Oliver, Smith's L. C. 460, in note. If the question could be considered as open to discussion, it might be worthy of deliberate consideration. But it would seem to be too late to entertain it.

2. Where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

There is an irreconcilable difference in the decided cases respecting this proposition. It is believed, however, to be fully established by the better considered opinions; and to be in accordance with well-established principles.

It is sustained in this State by the cases of Allen *v.* Sayward, 5 Greenl. 227, and Ham *v.* Ham, 14 Maine R. 351, and opposed by the case of Fairbanks *v.* Williamson, 7 Greenl. 96.

In New Hampshire it is sustained by the case of Kimball *v.* Blaisdell, 5 N. H. R. 533.

In Massachusetts it is sustained by the cases of Somes *v.* Skinner, 3 Pick. 61; Blanchard *v.* Brooks, 12 Pick. 47; Comstock *v.* Smith, 13 Pick. 116, and opposed by the case of Trull *v.* Eastman, 3 Metc. 121.

In Connecticut it is sustained by the case of Dart *v.* Dart, 7 Conn. R. 250.

In New York it is sustained by the cases of Jackson *v.* Wright, 14 Johns. R. 193; Jackson *v.* Bradford, 4 Wend. 619; Pelletreau *v.* Jackson, 11 Wend. 110; Jackson *v.* Waldron, 13 Wend. 178. And it may be considered as opposed by the cases of Jackson *v.* Bull, 1 John. Cas. 81, and Jackson *v.* Murray, 12 Johns. 201. If they be so considered, they were overruled by the case of Pelletreau *v.* Jackson.

In Ohio it is sustained by the case of Kinsman *v.* Loomis, 11 Ohio, 475.

The only suitable inquiry to be entertained in this State is, whether our own case of Fairbanks *v.* Williamson, although the doctrine asserted in it may have been approved elsewhere, as well as in the case of White *v.* Erskine, can upon sound principles be sustained. The deed in that case contained no covenant but that of *non-claim*. The ground upon which it was decided, that a title subsequently acquired inured to the vendee, appears to have been, that the covenant of non-claim was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto."

Covenants, which relate to the land, are said to run with the land. Sale *v.* Kitchingham, 10 Mod. 158; Norman *v.* Wells, 17 Wend. 136. But a covenant which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance. Spencer's Case, 5 Coke, 17 b; Lucy *v.* Livingston, 2 Lev. 26; Lewes *v.* Ridge, Cro. Eliz. 863; Bickford *v.* Page, 2 Mass. 460; Slater *v.* Rawson, 1 Metc. 456; White *v.* Whitney, 3 Metc. 81; Clark *v.* Swift, 3 Metc. 390; Chase *v.* Weston, 12 N. H. 413; Garfield *v.* Williams, 2 Verm. 327; Beardsley *v.* Knight, 4 Verm. 471; Mitchell *v.* Warner, 5 Conn. 497; Kane *v.* Sanger, 14 Johns. 89; Beddoe *v.* Wadsworth, 21 Wend. 120; Garrison *v.* Sandford, 7 Halst. 261; Randolph *v.* Kinney, 3 Rand. 394; Backus *v.* McCoy, 3 Ham. 211; Allen *v.* Wooley, 1 Blackf. 139. The cases of Kingdom *v.* Nottle, 1 M. & S. 353, and 4 M. & S. 53, are denied to have been correctly decided in Mitchell *v.* Warner, 5 Conn. 497, and in Clark *v.* Swift, 3 Metc. 390. Kent, also in speaking of covenants, which run with the land, says, "they cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate;" 4 Kent's Com. 472, note b.

Admitting the covenant in the deed, alluded to in Fairbanks *v.* Williamson to be a covenant that might run with the land, it could not run or be transferred by law, to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped,

because the law will not permit one, who has in such a solemn manner admitted a matter to be true, to allege it to be false. "This," says Kent, "is the reason of the doctrine of estoppels:" 4 Kent's Com. 261, note d; where he also says, "a release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title, subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise." The covenant of non-claim asserts nothing respecting the past or present. It is only an engagement respecting future conduct.

One who acquires no title by a release without covenants respecting the title, cannot recover back the purchase-money which he paid for it. Emerson *v.* The County of Washington, 9 Greenl. 88. To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in another and less direct mode property of more value than the purchase-money.

The conclusion is that the doctrine asserted in the case of Fairbanks *v.* Williamson cannot, upon sound principles, be admitted, and that the decided cases in this and other States are opposed to it.

When Jellison made his deed of release to the demandant, he was in possession in submission to the title of Ward, and was but a tenant at will to him. Not being seised of a fee simple he could not convey it. The demandant must have known, when he received the deed, that Jellison had no title and could convey none, for he, at the same time, took an assignment of Jellison's contract, to purchase that land of Ward. He subsequently acted as an appraiser to make a levy and to pass the title to a part of that land, from a grantee of Jellison to a creditor of that grantee. There is no allegation in the deed of Jellison to the demandant respecting the title, which it would be necessary for Jellison or his grantee to deny or contradict by setting up a title subsequently acquired. Demandant non-suit.

Grantor May Regain Title from Grantee by Adverse Possession.

Garibaldi *v.* Shattuck, 70 Cal. 511; 11 P. 778.

BELCHER, C. C. This an action to quiet title to certain land in Butte County. The plaintiff had judgment and the defendant appealed.

It appears from the findings that on the twenty-sixth day of Feb-

ruary, 1866, one Richard F. Floyd was in possession of the land in question — it being then public land of the United States — and on that day, on his own motion, and without consideration of any kind, made a deed purporting to convey it in fee to the defendant. The deed was acknowledged and recorded, but the grantee did not take possession under it. On the contrary, Floyd remained in possession; and from that time until April, 1885, he held the actual, open, notorious, exclusive, peaceable, and adverse possession of the premises, and of every part thereof, claiming the same in his own right, and adversely to all the world, and especially as against the defendant. In May, 1881, Floyd obtained the title to a part of the land by patent from the United States, and in June, 1885, he obtained the title to the balance of it by deed from the Central Pacific Railroad Company. Floyd conveyed the land to the plaintiff, and the plaintiff thereupon commenced this action.

It is now claimed for the defendant, appellant here, that the titles acquired by Floyd in 1881 and 1885 immediately passed to and vested in the defendant by reason of his deed of 1866. We do not think that this claim can be maintained. There can be no doubt that a grantor, even with a covenant of warranty, may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee. Franklin *v.* Dorland, 28 Cal. 180; Sherman *v.* Kane, 86 N. Y. 57; Traip *v.* Traip, 57 Me. 268; Smith *v.* Montes, 11 Tex. 24.

An adverse possession of land for the period of time prescribed by the statute not only bars the remedy, but practically extinguishes the right of the party having the true, proper title, and vests a perfect title in the adverse holder. Arrington *v.* Liscom, 34 Cal. 365; Cannon *v.* Stockmon, 36 Cal. 535; Leffingwell *v.* Warren, 2 Black, 605.

When Floyd obtained his title, in 1881, he had been in the adverse possession of the premises for 15 years, and the title, whatever it was, conveyed by the deed of 1866, was extinguished. He had again, as against all the world, except the United States, become the owner of the property as completely as he would have been if the defendant had conveyed it to him. But if the defendant had conveyed it to him, would any one contend that the new title at once passed to the defendant notwithstanding his deed? We think not. The true rule is that an after-acquired title passes to a prior grantee only so long as the prior grantee has some estate, interest, or claim in or to the property granted. When he has ceased to have any estate in the prop-

erty, he has nothing to be fed by the new title, and so cannot claim it.

Manley *v.* Howlett, 55 Cal. 94, is not in conflict with what has been said. In that case plaintiff sued in ejectment, and to establish his title relied upon a patent issued less than five years before the commencement of his action. The defendant pleaded the statute of limitations, but it was correctly held that the statute did not begin to run until the issuance of the patent.

The judgment should be affirmed.

We concur: Searls, C.; Foote, C.

By the Court: For the reasons given in the foregoing opinion the judgment is affirmed.

Abandonment of Adverse Possession After the Statutory Period of Limitation, Does Not Transfer Title to Disseisee.

School District *v.* Benson, 31 Me. 381.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood-house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive, and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse, and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that effect if not controlled or explained by other testimony. Little *v.* Libby, 2 Greenl. 242; The Proprietors of Kennebec Purchase *v.* John Springer, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken

away, and any action by them to recover the same, is barred by limitation. Stat., c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed, it vests the fee simple although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proofs, and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

No doubt a desseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title obtained by a disseisin so long continued as to take away the right or entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed: but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands, creates nothing more than an estate or lease at will. Stat., c. 91, § 30.

The exceptions are sustained and a new trial granted.

Surrender from Unrecorded Deeds Transfers Title to Grantor.

Happ. *v.* Happ., 156 Ill. 183; 41 N. E. 39.

Craig, J. This was a proceeding in the superior court of Cook County, brought by appellant, Simon J. Happ, under the burnt-record act, to establish title to certain premises in Cook

County, described in the petition. The defendants put in an answer, and also filed a cross petition, praying that the title to the premises be confirmed in them. On the hearing, upon the pleadings and evidence and report of the master the court entered a decree in favor of defendants in the cross petition, to reverse which the complainant appealed.

It appears from the record that John Happ, father of petitioner, was originally the owner in fee of the premises in controversy; that he claimed title thereto by mesne conveyances from the government. On the 3d day of September, 1856, John Happ and his wife, Gertrude, executed a deed, which purported to convey the premises to Simon J. Happ, the petitioner, who was then about 16 years of age. Whether this deed was ever delivered to the grantee is a question left in doubt from the evidence. The deed was, however, never placed on record. In 1858, Simon Happ became very anxious to go to California, and called on his father to furnish him money to make the journey. After much persuasion the father consented, and gave the young man $300 in gold. It is claimed by the defendants that petitioner, upon receiving the $300 from his father, agreed to surrender all title he held to the land in controversy, and in pursuance of this agreement the deed was surrendered and canceled; while, on the other hand, petitioner claims that he turned over a horse and wagon, carpenter tools, some cord wood, and a few pigs for the money advanced, and that he left the deed in the hands of his mother for safe-keeping. Upon receiving the money, petitioner went to California. John Happ remained in possession of the land in dispute until May 25, 1863, when he died. Before his death he made a will, in which he devised the premises to his wife, Gertrude. The will having been probated, Gertrude Happ went into the possession of the premises, and continued in possession until August, 1876, when she conveyed a portion of the premises to her sons John and Bertrom Happ, and in September, 1877, she conveyed the remainder to Bertrom Happ. These grantees, and those claiming under them, have held the possession of the premises ever since. It is conceded in the argument of the petitioner that he, at the time he went to California, in 1858, surrendered to his father his interest in the premises, although no deed was executed by him reconveying to his father. The surrender of his interest and return of the deed to him would be sufficient to invest the father with an equitable interest in the premises, and preclude a recovery by petitioner; and this seems to be in harmony with the law as laid down by this court in Sanford *v.* Finkle, 112 Ill. 146. The real question, then, in controversy between the parties is whether

the petitioner, in 1858, received from his father $300, and in consideration of the money so received surrendered his deed and claim to the property.

The first witness who testified in regard to the arrangement between the petitioner and his father was John Happ. He testified that he was present when the deed was made; that it was retained in the possession of the grantor for the reason, he thought, the grantee was too young to be intrusted with the custody of a deed. He further testified: "My father kept that deed in his own possession. I have seen it different times. I saw it five or six years after my father had it in his possession. Simon came to Chicago to learn the carpenter trade, and it was hard times, and he could hardly make enough to pay his board. And finally there were a lot of young fellows going to California, and Simon wanted to go, and teased father a couple of months for $300. That was all the money my father had, and that was all the land he had. And father didn't like to give him the money, because he was too old to work; but he didn't give up till father gave him $300 in gold. I was present at the time, and father then said: 'Now, Sam, you ain't going to have this land if you take that money. I have got to keep that land to myself.' Sam replied: 'Well, I am satisfied with the money, to go out to California, because I know I can do better in California than I can do here.' That was in 1858. I was present at the time. My father would never do anything without asking my permit, — what I thought of it. This conversation took place about two weeks before Simon went away. They talked about the same matter afterwards. Sam went to California, and was there eight years, and he came back, and was here eight years, and never opened his mouth about the land. I can't say that they talked about it again before Simon went to California. My father gave Simon $300 in gold about two weeks before he went to California. Simon was then about eighteen years old. After Simon went to California, I have heard father say he was going to keep that land, and will it to my mother, so that she would have something to depend on." In addition to the evidence of this witness it appears that a short time before Simon Happ started for California he visited his sister, Catherine Peterman, and while there she and her son, John Peterman, testify that Simon stated that he had received $300 from his father, and that he had nothing further to do with the land. There was also other evidence in corroboration of the testimony of the three witnesses. On the other hand, the petitioner, in his evidence, denied making the statements in reference to the money and the land proven by

defendants, and, in addition to this, he called as a witness Joseph Happ, who in substance testified that petitioner left with his father certain articles of personal property to be turned into money in payment of the $300 received from the father. He also testified that Simon told his father he would leave the deed with him until he returned, and his father said he would take care of the land. The master in chancery, in his report, found "that the plaintiff gave the deed to his parents, intending thereby to accept $300 in full payment therefor;" and we are inclined to the opinion, after a careful consideration of all the evidence in the case, that the finding is sustained by a preponderance of the evidence.

Moreover, the long delay and laches of petitioner in asserting title to the premises may be regarded as a bar to the relief claimed in the petition. John Happ, the father of the petitioner, went into the possession of the land in 1858. From that time on he continued in the possession, asserting title, and paid all taxes each year on the land until his death, in 1863. After his death, his widow, Gertrude, to whom the land was devised, entered into the possession, and paid the taxes each year until 1876 or 1877, when she conveyed, and her grantees have held the land and paid all taxes ever since. The bill was not filed in this case until 1893. Here was a period of over 30 years in which the complainant, with a full knowledge of all the facts, has suffered John Happ and those claiming under him to possess and control the land as absolute owners, without asserting title to the property. This long delay may be regarded as a complete bar to the relief claimed in the petition. The decree of the superior court will be affirmed. Affirmed.

Wife of Grantee has Dower in Lands Notwithstanding the Surrender of the Unrecorded Deeds, Except as Against a Bona Fide Purchaser.

Wheeler *v.* Smith, 62 Mich. 373; 28 N. W. 907.

Morse, J. This is an action of ejectment to recover the possession of forty acres of land in the county of Livingston. John R. Mason, then the owner of the premises in fee, conveyed this land, by warranty deed, dated November 15, 1865, and properly executed, witnessed, and acknowledged, to William Wheeler, husband of the plaintiff Bridget, and father of the plaintiff William L. Wheeler. Wheeler never recorded his deed, but moved upon the premises, then unimproved, built a log house and stable, and occupied them about two years, clearing up and

chopping ten or fifteen acres. In April, 1868, the plaintiff Bridget was sick, and, with the consent of her husband, went to East Saginaw, to her mother's, leaving her husband on the farm with all the household goods. She remained at Saginaw about one year. While she was away, and in November, 1868, John R. Mason, with the full consent and at the request of her husband, William Wheeler, executed another deed of the land to Andrew Bly, but without the knowledge or consent of the wife. It seems that Wheeler wrote upon the back of the deed from Mason to himself as follows: "I hereby give up this deed, and authorize and request John R. Mason to deed the premises to Andrew Bly." In 1869, Bly deeded to one Love, who, in the same year, conveyed to one Andrews. In 1870 Andrews deeded the premises to one French, who, in 1872, conveyed back to Andrews again. October 5, 1872, Andrews, having the title, conveyed to the defendant, who has since owned and occupied the same. These deeds were all warranties, and recorded. William Wheeler, after or about the time of the deed from Mason to Bly, moved off from the premises, and went to Fenton, Genesee County, to live, where his wife found him. He or his wife never transferred the premises by deed to any one. They lived together at Fenton about 12 years, Wheeler dying in 1881. They rented a place in Fenton in the spring of 1869, and in the fall Wheeler purchased it, the deed being taken in the name of the wife. The property in Fenton was a frame house and four village lots, and cost $950.

After the death of her husband, Mrs. Wheeler commenced an action in ejectment to recover her dower in the same premises involved in this suit. The case will be found reported in 21 N. W. Rep. 370. We there held the defendant, Smith, a *bona fide* purchaser of the land, and the unrecorded deed to Wheeler void as against him, and denied the plaintiff right of dower in the premises. We said in that case: "Whatever plaintiff's rights may have been, they depended solely on the unrecorded deed to her husband. Under the statute, defendant's honest purchase, made under previous *bona fide* purchasers, left this precisely as if it had never existed."

We find no reason in the present record to change our holding. The defendant is substantially admitted to be a good-faith holder in the present case. The counsel for plaintiffs argues very forcibly and eloquently that the homestead right vested in the wife and family when Wheeler moved upon the premises under the unrecorded deed; and that neither the husband, without her consent, or any operation of the registry laws brought about by his connivance or negligence, could alien or transfer

the right away from her; that the right is a constitutional one, which even the legislature cannot bar by the passage of registry, or and other statutes. We do not deem it necessary, however, to enter into any discussion of this question of constitutional right or legislative power. The testimony of the plaintiff Bridget Wheeler shows plainly enough that both she and her husband abandoned these premises as a homestead some seventeen years ago, and the same year acquired another upon which they lived thereafter. A person cannot have at the same time two homesteads; and the infant plaintiff is bound by the acts of his father and mother.

It is argued that the wife did not intend to give up the farm homestead, and that she remained and lived away from it, at Fenton, in the new home, not from choice, but because she was compelled to, or live apart from her husband, and perhaps become liable to be divorced from him for desertion; and it is also claimed that she was excused from taking any steps to reclaim, or give notice of her intention to assert her rights in this homestead, because she was a married woman, and could not move until the death of her husband. If this be good excuse, then, if Wheeler had lived forty years longer, she could at his death have recovered her homestead rights, though the land had been occupied and cultivated for half a century by people ignorant of her claim.

If she wished to dissent from her husband's sale of his interest, as against *bona fide* holders, without notice of his ever having any title to the premises, or that she had homestead or other rights therein, she should have taken some means to notify parties of her claims. She knew how her husband parted with his interest, and that the land was being occupied by parties in good faith, under and through the deed of Mason to Bly, or some conveyance from her husband to Bly, and yet she takes no steps whatever in relation to the matter, but settles down quietly and peacefully, without quarrel even with her husband about the sale of the farm, in the new home at Fenton, which is contracted and paid for by Wheeler, but deeded to her. There is no merit whatever in her claim, and there are no errors in the record that could have altered the inevitable result of the trial.

The judgment is affirmed, with costs of both courts.

The record is remanded for such further proceedings as the parties may see fit to take under the statute.

The other justices concurred.

CHAPTER XXI.

TITLE BY GRANT — PUBLIC GRANT — INVOLVING ALIENATION — PRIVATE GRANT.

Moore *v.* Robbins, 96 U. S. 530.
Boom Co. *v.* Patterson, 98 U. S. 403.
Childers *v.* Schautz, 120 Mo. 305; 25 S. W. 209.
Havens *v.* Seashore Land Co., 47 N. J. Eq. 365; 20 A. 497.

Public Grant from the United States or State Government.

Moore *v.* Robbins, 96 U. S. 530.

Mr. Justice MILLER. This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception, it was a bill in the circuit court for DeWitt County, to foreclose a mortgage given by Thomas I. Bunn to his brother, Lewis Bunn, on the south half of the southeast quarter and the south half of the southwest quarter of section 27, township 9, range 3 east, in said county. In the progress of the case, the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and that they were made defendants, and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the southwest quarter of the southwest quarter of said section, and had the patent of the United States giving him title to it.

Davis answered that he was the rightful owner of the southeast quarter of said southwest quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the president for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterward sold under a valid judgment and execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen, that, while Moore and Davis each assert title to a different forty acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this court must take cognizance.

As regards Moore's branch of this case, it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over $2.50 per acre, at a public land sale, by the officers of the land district at Danville, Illinois, November 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn; whereupon Moore appealed to the commissioner of the General Land Office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the secretary of the interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the land department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver, and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal nor an equitable title to the land.

The Supreme Court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the land department, including the secretary of the interior, the acts of Congress had confided the determination of this class of cases; and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the courts are bound by it, and must give effect to it. Robbins *v.* Bunn, 54 Ill. 48.

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public

land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public land; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the court, in United States *v.* Stone, 2 Wall. 525, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy." See, also, Hughes *v.* United States, 4 Wall. 232; *s. c.* 11 How. 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the executive department over the title. The functions of that

department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the president, and sealed, and delivered to and accepted by the grantee. It is a matter of course, that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the secretary of the interior, therefore, in Moore's case, was made without authority, and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the court this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis; to wit, November 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the 20th day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver, and asserted a right, by reason of a pre-emption commenced on the 8th day of November, 1855, to pay for the south half of the southwest

quarter and the south half of southeast quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side, and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers, in favor of Bunn; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the secretary of the interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore; and the secretary, therefore, had the authority, undoubtedly, to decide finally for the land department who was entitled to the patent. And though no patent had been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The Supreme Court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this court in Johnson *v.* Towsley, 13 Wall. 72. The doctrine announced in that case, and repeated in several cases since, is this: —

That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterward comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and imposition, and in cases where it is clear that those officers have, by a mistake of law, given to one man the land which on the disputed facts belonged to another, to give appropriate relief.

In the recent case of Shepley et al. *v.* Cowan et al., 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they

themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the land department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of Atherton *v.* Fowler we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre emption. In the enforcement of this policy, the act of September 14, 1841, which for the first time established the general principal of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that act: —

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the president, nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid." 5 Stat. 457.

There can be no misconstruction of this provision, nor any doubt that it was the intention of Congress that none of the liberal provisions of that act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price

before the commencement of the sales ordered by the president's proclamation. We do not decide, because we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the act of 1841, though part of it is found in the Revised Statutes, § 2282, as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time. The act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at $2.50 per acre, before they should be offered for sale at public auction. 10 Stat. 244. This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections, and it may be doubted whether any right of pre-emption by a settlement made afterward existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it requires in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that, while Bunn's pre-emption claim comes directly within the provisions of both statutes, they were utterly disregarded in the decision of the secretary of the interior, on which alone his case has any foundation.

We have no evidence in this record at what time the president's proclamation was issued, or when the sale under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to them a few cents in price above the minimum of $2.50, below which these alternate sections could not be sold, and that this was on the 15th day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week, or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that this settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice of his

intention to pre-empt the land, by filing what is called a declaration of that intention in the land office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation, and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim, and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the president. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make were made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court of Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State must be reversed and the cause remanded to that court for further proceedings in accordance with this opinion; and it is so ordered.

Title by Eminent Domain.

Boom Co. *v* Patterson, 98 U. S. 403.

Mr. Justice FIELD. The plaintiff in error is a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum rivers in that State. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and where such land is private property, to apply to the district court of the county in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or to any one claiming an interest in the land, an appeal may be taken to the district court, where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The court is then required to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the Supreme Court of the State on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi river, above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the

river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the district court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. When the case was brought before the district court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the circuit court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at $9,358.33; but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at $300, and, in view of its adaptability for those purposes, a further and additional value of $9,058.33. The company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to $5,500. The owner made this election, and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error.

The only question on which there was any contention in the circuit court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now raise a further question as to the jurisdiction of the circuit court. Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy, and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court.

The position of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires

no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a popular matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties — the owners of the land on the one side, and the company seeking the appropriation on the other — there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the district court. Turner *v.* Halloran, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The act of March 3, 1875, provides that any suit of a civil nature, at law or in equity, pending or brought in a State court, in which there is a controversy between citizens of different States, may be removed by either party into the circuit court of the United States for the proper district; and it has long been settled that a corporation will be treated, were contracts

or rights of property are to be enforced by or against it, as a citizen of the State under the laws by which it is created, within the clause of the constitution extending the judicial power of the United States to controversies between citizens of different States. Paul *v.* Virginia, 8 Wall. 177. And in Gaines *v.* Fuentes, 92 U. S. 20, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the circuit court, and that it had jurisdiction to determine the controversy.

Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river;

as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi river must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in Atlee *v.* Packet Company, 21 Wall. 389, we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream. Aside from this, we do not think that the State is precluded by anything in the charter of the company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by the counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was: "What is the value of the property for the most advantageous uses to which it may be applied?" In Goodwin *v.* Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court held that the rule of valuation was what the interest in the canal company was worth, not for canal purposes or any other particular use, but generally for any and all uses for which it might be suitable. And in Young *v.* Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them. Judgment affirmed.

Tax Title Based on Judgment for Delinquent Taxes.

Childers *v.* Schautz, 120 Mo. 305; 25 S. W. 209

Black, C. J. This was an action of ejectment for 160 acres of land in Vernon County. James H. Godsey owned the land at the time of his death. He died in 1862, leaving a widow, Elizabeth, and two sons, namely, William E. and James H. Godsey. The widow married John Banner. She and Banner and the two sons conveyed the lands to the plaintiff in this suit by a quitclaim deed dated the 4th February, 1888. The

defendants, for title, rely upon the following proceedings and deed: In 1880 the collector commenced a suit against William Godsey, Elizabeth Banner, and John Banner, her husband, and the unknown heirs of James H. Godsey, to enforce the State's lien for taxes for the year 1878. The defendants were notified by a vacation order of publication. At the return term, — that is to say, November term, 1880, — and after the order of publication had been made, the petition was amended by inserting the name of J. F. Norman as an additional defendant, and he entered his appearance. Judgment was then entered against all the defendants, it being a judgment by default as to all except Norman, who had appeared. The land was sold under a special execution issued on this judgment, and Norman became the purchaser, and received a sheriff's deed, dated 5th May, 1881. All the title acquired by Norman passed through several persons by warranty deeds to John C. Taylor, who conveyed to the defendants by warranty deed dated in August, 1885. At that date the land was open prairie, unoccupied, and had never been fenced or broken. The plaintiff, to defeat the above-mentioned sheriff's deed to J. F. Norman, produced in evidence another sheriff's deed to William R. Crockett, dated the 7th of November, 1878, based upon a special execution issued upon a judgment rendered upon an order of publication in a suit of the collector against James H. Godsey and James L. Nichols, to enforce the State lien for delinquent taxes for the years 1869 to 1876, and a quitclaim deed from Crockett to J. F. Norman. These deeds were recorded in June, 1880. James H. Godsey died, it will be seen, some 15 years before the commencement of the last-mentioned tax suit; and Nichols, the other defendant, had no interest in the property.

1. We will first notice the objections made to the sheriff's deed to J. F. Norman, upon which the defendants rely for title. That deed stands upon the judgment in the suit instituted by the collector against William Godsey, Elizabeth Banner, and John Banner, her husband, and the unknown heirs of James H. Godsey. The petition in that case, as has been said, was amended by adding the name of J. F. Norman as a defendant after the publication against the other defendants had been made; and the first objection is that there should have been a new order of publication. This case is unlike that of Janney *v.* Spedden, 38 Mo. 395, to which we are cited. That was a suit to enforce a vendor's lien. Janney had been notified by publication only, and the plaintiff then dismissed his petition as to all that part asking for the enforcement of the lien, and on the order of publication took a personal

judgment against Janney. The court held that the object and nature of the suit was wholly changed by discontinuing as to the part of the petition seeking the enforcement of a vendor's lien, and that the personal judgment rendered was void. Here the plaintiff amended by adding a new defendant, nothing more; the cause of action remained the same after as before the amendment. As the amendment did not in the least change the cause of action, it was not necessary to take out a new order of publication.

The next objection to this deed is that the order of publication is worthless, because it did not notify the defendants when to appear. The papers and files in that case were lost when this one was tried. The suit was commenced in 1880. The person who was deputy clerk at that time testified that a book was kept in the office, known as the "Book of Orders of Publication in Vacation;" that the book contained printed forms, with blank spaces for names of parties, description of lands, dates, etc.; and that it was his custom to issue an order of publication, and then copy them in his book, and send the originals, signed and under the seal of the court, to the printer. The copy of the order of publication found in this book, produced in evidence, is conceded to be formal, except that part which is in these words: "And unless they be and appear at the next term of said court, to be holden at the courthouse in the city of Nevada, in the county and State aforesaid, on the first Monday in November, 187 , and on or before," etc., the deputy clerk testified further that he was satisfied the date was filled out in the order sent to the printer so as to read on the first Monday of November, 1880, and that the blank in the book was not changed to correspond with the order by reason of some oversight. There is here a manifest clerical error. According to the evidence of the deputy clerk, the original order was sent to the newspaper office, so that the order produced in evidence is but a copy, and therefore secondary evidence. The evidence of the clerk tends to show that the original order specified the first Monday in November, 1880, as the date when the defendants should appear, and this conclusion is perfectly reasonable when we consider the fact that the copy in the book was made out by filling blank spaces in a printed form. It also appears from the recitals in the judgment that there was an affidavit of the publisher of the newspaper on file when the judgment by default was entered, and that this affidavit was examined by the court. The usual practice is to attach a copy of the order as published to the affidavit, so that the inference is a fair one that the court examined the order as published before giving judgment by default. The mistake was in

the original order or in the copy or in both, and there is an abundance of evidence from which the court could find, as it did, that the mistake was in the copy produced in evidence, and not in the original published order. The objection to the publication is therefore not well taken, because the court found the fact to be that the published order notified the defendants to appear on the first Monday of November, 1880.

2. It is next insisted that J. F. Norman acquired no title by the sheriff's deed to him, because he is to be deemed to have been in possession of the land at the date of that deed under a prior claim and color of title, and hence it was his duty to pay the taxes, and his purchase of the land under the tax suit judgment amounted to no more than a payment of them. Norman was not, and never had been, in actual possession. This is conceded. The claim that he is to be deemed to have had possession is based on section 7698, Rev. St. 1889, which provides in substance that any person putting a tax deed on record shall be deemed to have set up such title as to enable the claimant to prosecute an action for the possession. This section comes down from the revenue act of 1872, and the "tax deed" mentioned in it has reference to a collector's deed made under the provisions of that act. That section therefore has no application to a sheriff's deed made pursuant to a sale under an execution issued on a judgment in a suit to enforce the State's lien for delinquent taxes. Norman therefore did not have actual or constructive possession when he purchased the land under the judgment against himself and the unknown heirs of James H. Godsey. Though not in possession, it seems he made some claim to the land at that time; for the old sheriff's deed to Crockett and the quitclaim deed of the latter to Norman were of record at that date. Besides this, it appears Norman appeared in court on the same day that he purchased the property at the sheriff's sale, and moved the court to order the sheriff to pay over to him the amount which he bid in excess of the judgment and costs — that is to say, $38.44 — and this motion was sustained. We are not called upon here to determine what effect claiming and obtaining this excess would have in a suit between Norman and the heirs of Godsey. "A purchaser at a sheriff's sale looks to the judgment, execution, levy, and sheriff's deed. All other questions are between the parties to the judgment and the sheriff." Lenox *v.* Clark, 52 Mo. 115; Hewitt *v.* Weatherby, 57 Mo. 276. The same rule applies in favor of those who acquire title from the purchaser at the execution sale. The defendants were therefore not bound to take notice of the subsequent order directing the excess to be paid over to Norman. The old

sheriff's deed to Crockett, based upon the judgment in the tax suit against Godsey and Nichols, conveyed no title, because Nichols never had any interest in the land, and because Godsey was dead when that suit was commenced (Graves *v.* Ewart, 99 Mo. 17; 11 S. W. 971); and it follows that the quitclaim deed from Crockett to Norman conveyed nothing. The facts, then, as to this branch of the case are that Norman was not in possession, and had no title to the land when he purchased at the sale under the tax judgment against himself and the heirs of Godsey. That judgment simply ordered the land to be sold to pay the taxes thereon. There was, and could have been, no personal judgment against the defendants, or any of them. There was no relation of confidence or trust existing between him and them, and he was under no obligation to them to discharge the tax lien. If he did not acquire title by his purchase it was because he was in duty bound to the State to pay the taxes, and ought not to be allowed to make profit by a disregard of that duty. It is generally held that one in possession under claim and color of title should pay the taxes, and hence cannot acquire title by purchase at a tax sale. Black Tax Titles (2d Ed.), § 289. The same author, when speaking of those cases where one holding a tax title seeks to strengthen it by a second purchase, says: "The cases found a distinction upon the facts of possession, and hold that the title of a tax-sale purchaser, who is in possession under the deed, is not strengthened by successive purchases at subsequent sales of the same land for taxes. * * * Consistently with the foregoing, it is also thought that one who holds a tax deed, whether valid or void, under which he has not gone into possession, may abandon all claim of title under it, and acquire title under a deed for taxes assessed upon the land, after he took such earlier deed." Section 291. In the case of Pickering *v.* Lomax, 120 Ill. 289; 11 N. E. 175, which was an action of ejectment, the plaintiff claimed under a series of deeds from individuals. For another title he put in evidence a tax deed based upon taxes which accrued while he made claim to the land under the deeds from the individuals. As to this tax deed it was said: "If the plaintiff had been in the actual possession of the land under claim of title, the law would require him to pay the taxes, and, it being his duty to do so, it may be true that in such case he could not profit by a disregard of a legal duty, by allowing the land to go to sale and thus acquire title. But the plaintiff was not in the possession of the land, and he did not have title, as we have shown, and he was under no obligation to pay the taxes on the land he did not own, and, being under no

obligation to do so, we see no reason why he might not purchase a tax title on the land, and rely on such title, as well as any other person, not interested in the premises." The following cases are to the same effect: Atkinson *v.* Dixon, 89 Mo. 464; 1 S. W. 13; Lybrand *v.* Haney, 31 Wis. 230; Blackwood *v.* Van Vleit, 30 Mich. 118; Coxe *v.* Gibson, 27 Pa. St. 160. There was, as we have said, no relation existing between Norman and the heirs of Godsey, which made it his duty to them to pay the taxes, and he was under no obligation to the State to pay them, for he was neither the owner of the land nor in possession; and we conclude he had a right to purchase at the sale made by virtue of the special execution, and that by such purchase he acquired the title of his codefendants. Neither the fact that the collector saw fit to make him a defendant in the tax suit, nor the fact that he placed upon the record the prior worthless deeds, can have the effect to resolve the last purchase into a simple payment of the taxes. The judgment is therefore affirmed. All concur.

Dual Character of Common Conveyances.

Havens *v.* Seashore Land Co., 47 N. J. Eq. 365; 20 A. 497.

Van Fleet, V. C. This is a partition suit. The title to one of the tracts which the complainants seek to have divided is in dispute. The defendant asserts title to the whole tract. The complainants, on the other hand, assert a title to the undivided half of it, but admit that the defendant has title to an undivided fourth, and that the title to the other undivided fourth is in certain other persons. The defendant exhibits a paper title to the whole tract. The important question, therefore, presented for decision is, is the title exhibited by the defendant valid? For, if it is, the bill, as against the defendant, as to that tract, must be dismissed. Both parties claim under David Curtis, who died testate between 1783 and 1788. At the time of his death he owned two undivided sevenths of Manasquan beach, one of which he acquired from Elisha Lawrence by deed dated July, 1770, and the other from Benjamin Lawrence by a deed which it is alleged is lost. Among the gifts made by David Curtis by his will, there is one which reads, in substance, as follows: "I give and devise unto my eldest son, Elisha, that right of beach I bought of Elisha Lawrence, — to him, and the heirs of his body lawfully begotten; and, for the want of such heir or heirs, then to be equally divided between my two sons John and Benja-

min." David Curtis, besides limiting over to his two sons John and Benjamin, the land devised to his son Elisha, made John and Benjamin his residuary devisees, and they, as such devisees, took that undivided seventh of Manasquan beach which had been conveyed to their father by Benjamin Lawrence. The thing in dispute is the one-half of that seventh which David Curtis acquired from Elisha Lawrence, and which he, by his will, limited over to his son John, in case his son Elisha, for the want of heirs of his body, did not take it. The defendant claims this half, and puts forward as the foundation of its title a deed purporting to have been made on the 31st day of May, 1788, by John Curtis to Joseph Lawrence. The whole contest between the parties centers in this deed. If it passed the land in controversy, the defendant will be entitled to prevail in this suit. If it did not, the complainants will be entitled to the decree they ask. The complainants contend — *First*, that the deed has not been sufficiently proved to entitle it to be admitted in evidence; and, *secondly*, that, if it was admitted, no effect could be given to it (1) for the want of apt words to pass any right or estate which the grantor may have held at the time of its execution, and (2) because the grantor then held no right or estate in the land which he could grant or convey. These questions will be considered in an order directly the reverse of that in which they have just been stated. It is undisputed that Elisha Curtis, the eldest son of David, died childless, never having had issue of his body. John died before Elisha. Their deaths occurred very near together in point of time, but the proofs make it entirely clear that John died first, so that it was undetermined when John died whether or not Elisha would have issue of his body. As the law stood when the devise to Elisha took effect, it is clear that he took an estate tail in the land devised. Our statute cutting an estate tail down to an estate for life in the first taker, with remainder in fee to the issue of his body, was not passed until 1820 (Elmer Dig., p. 130, pt. 6), and the devise to Elisha took effect prior to 1788. Chief Justice Kirkpatrick stated with great clearness, in Den *v.* Taylor, 5 N. J. Law, 413, 417, what words would be held to be sufficient to create an estate tail. He said: "It is as well settled that a devise to one and his heirs, and, if he die without issue, then over to another, creates an estate tail as if the principal devise had been, in the most technical language, to him, and to the heirs of his body. The words of the devise over, 'if he die without issue, then over to another,' limit the generality of the term 'heirs' in the principal devised, and lead us to the inevitable conclusion that the testator intended heirs of the body only, and not heirs generally. And whenever

this intention can be collected from the whole will, taken together, let the phraseology in the particular clauses of it be what it may, it has been always construed to make an estate tail." This statement of the law has been so uniformly followed by the courts of this State as to have become a canon of real property law. Moore *v.* Rake, 26 N. J. Law, 574, 585. It is entirely clear that Elisha Curtis took an estate tail in the land in controversy. This being so, it necessarily follows that the devise over to John and Benjamin, in case Elisha did not have issue of his body, gave them a vested remainder in fee, subject to be defeated by the birth of issue to Elisha. The law is settled that a remainder limited upon an estate tail will be held to be vested, though it is uncertain whether a right to possession will ever vest in the remainderman.

The decision of the court of errors and appeals in Moore *v.* Rake, 26 N. J. Law, 574, is directly in point, and furnishes an authoritative illustration of the manner in which this principle of law is to be applied. The devise in that case took effect in 1795, and was expressed substantially in this form: "I give to my son Isaac, his heirs and assigns, all my lands whereon I now live, to hold to him, his heirs and assigns, forever; but, if my son Isaac should die without lawful issue, then I give my land to my wife, her heirs and assigns, forever." The testator's son Isaac died in 1843, without issue, never having been married. His mother, the testator's widow, died in 1832, over 10 years before Isaac. The controverted question in the case was what estate the testator's wife took under the devise. The court held that she took a vested remainder, and not by way of an executory devise, nor a contingent remainder. Each of the three judges who wrote opinions — Chancellor Williamson, and Justices Elmer and Vredenburgh — so expressly declared. Justice Vredenburgh (page 586) gave the following summary of the leading rules distinguishing a vested from a contingent remainder: "An estate is vested when there is a present fixed right of present or future enjoyment. The law favors the vesting of remainders, and does it at the first opportunity. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of the actual enjoyment. A remainder limited upon an estate tail is held to be vested, though it is uncertain if the possession will ever take place." There can, therefore, be no doubt that John Curtis, by force of the devise to him, took a vested remainder in fee in the land in controversy, and it is equally certain, if such was the character of his estate, that he

had good right and full power to make an effectual conveyance of it during the life of his brother Elisha.

If a different conclusion had been reached as to the nature of John's estate, and it had been found that the remainder limited to him was contingent, still I think that the court would have been bound to declare, in conformity to the well-settled law on this subject, that he had full power, during the life of Elisha, to make an effectual conveyance of his estate in the land, though it was uncertain whether such estate would vest in possession. All contingent estates of inheritance, or possibilities coupled with an interest, where the person who is to take is certain, may be conveyed or devised before the contingency on which they depend happens. In Ackerman's Adm'rs *v.* Vreeland's Ex'r, 14 N. J. Eq. 23, 29, Chancellor Green said: "It may be relied on as a rule that every interest in lands, however remote the possibility is, may be released." The law on this subject, as stated by Sergeant Williams in his note to Purefoy *v.* Rogers, 2 Saund. 388, and adopted by the Supreme Court in Den *v.* Manners, 20 N. J. Law, 142, 145, and restated approvingly by Justice Vredenburgh in Moore *v.* Rake, 26 N. J. Law, 593, is this: It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates and possibilities, accompanied by an interest, are descendible to the heir, or transmissible to the representative, of a person dying, or may be granted, assigned, or devised by him, before the contingency upon which they depend takes effect." These authorities make it plain that the first question must be decided in favor of the defendant. At the date of the deed which the defendant puts forward as the foundation of its title, there can be no doubt that John Curtis had full power to make an effectual conveyance of the land in controversy.

Assuming, for the present, that the deed on trial has been sufficiently proved to entitle it to be admitted in evidence, the next question is, what effect shall be given to it? Did it pass the estate of John Curtis in the land in controversy? Its granting clause is in these words: "Witnesseth, that the said John Curtis, for and in consideration of the just and full sum of sixteen pounds, proclamation money, hath remised, released, and forever quitclaimed, and by these presents for himself and his heirs, doth fully, clearly, and absolutely remise, release, and forever quitclaim, unto the said Joseph Lawrence, all his right, title, interest, and property," etc. It will be observed that, although the grant is not made to the grantee and his heirs, it is made by the grantor for himself and his heirs. This language,

standing by itself, and in the absence of any words plainly indicating that the estate to be granted was less than a fee, would seem to furnish very cogent evidence that the grantor intended to convey a fee. That such was the intention of the maker of this instrument is put beyond all question by the language of its *habendum*, which is in these words: "To have and to hold the above, [then designating the thing conveyed,] with, all and singular, the privileges and appurtenances thereunto belonging, [reserving liberty to fish and gun,] to the only proper use, benefit, and behoof of him, the said Joseph Lawrence, his heirs and assigns forever; so that neither he, the said John Curtis, nor Mercy, his wife, nor their heirs, nor any other person or persons, for themselves, or any other of the name, or in the name, right, or stead of any of them, shall or will, by any way or means, hereafter claim, challenge, or demand any right, title, or interest of, in, or to the said right, or any part or parcels thereof." Where the granting clause of a deed is silent as to the estate intended to be conveyed, resort may be had to the *habendum* to ascertain the intention of the grantor in that regard. It cannot be used either to enlarge or diminish the estate specifically defined in the granting clause, for if it is repugnant to that clause it is void; but, if that clause is either silent or ambiguous, then the *habendum* becomes the standard by which the estate granted must be measured. The chief justice, speaking for the court of errors and appeals, in Gravel Co. *v.* Newell, 52 N. J. Law, —, 19 Atl. Rep. 209, said: "The well-settled rule is that, if the granting part of the conveyance does not, by clear and definite terms, conclude the question, this clause (the *habendum*), whose office is to define the extent of the ownership granted, may be resorted to. It may be used to explain, but not to vary or control, the premises." And Justice Depue, in speaking for the same court, in Melick *v.* Pidcock, 44 N. J. Eq. 525, 540; 15 Atl. Rep. 3, said: "To create a fee the limitation must be to heirs, but it may be made either in direct terms or by immediate reference, and it is not essential that the word 'heirs' be located in any particular part of the grant." No doubt can be entertained that, if this instrument passed anything, it passed a fee.

But it is further said that the deed on trial contains no words of conveyance, but merely words of release, and as the defendant has admitted by its answer that so far as it has been able to discover, the person to whom the release was made was, at the date of its execution, without right of any kind in the land released, the release must, as a matter of law, be adjudged to be without legal force. Both of the propositions of fact upon which this contention rests appear to be true. The operating or essen-

tial words of the deed are "remise, release, and quitclaim," and it is also true that the defendant admits that the person to whom the deed was made, was at the date of its execution, without right in the land released; but, as I understand the law, it does not follow that the deed, for these reasons, must be adjudged to be nugatory. On the contrary, I think the law from the earliest times has made it the duty of the courts in all cases, where it appeared that the deed put on trial was founded on a valuable consideration, and there was no reason to declare that it had been unfairly obtained, to sustain it and carry it into effect, if by law it were possible to do so. More than a century ago Lord Mansfield said: "The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense, that they shall operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention." Goodtitle *v.* Bailey, Cowp. 597, 600. And in Sheppard's Touchstone the same doctrine is stated in this wise: "A deed that is intended and make to one purpose may inure to another; for, if it will not take effect that way it is intended, it may take effect another way. And therefore a deed made and intended for a release may amount to a grant of a reversion, an attornment or a surrender, or *e converso*. And if a man have two ways to pass lands by the common law, and he intended to pass them one may, and they will not pass that way, in that case, *ut res valeat*, they may pass the other way." First Amer. Ed. 82. Judge Hare, in his notes to Roe *v.* Tranmarr, Willes, 682; 2 Wils. 75, says: "Any instrument which shows that a title was meant to be given in return for value received will be equally effectual with the most formal deed; words to raise a use, and a consideration to support it, being all that is requisite to call the statute of uses into operation, and constitute a bargain and sale. A deed which has failed of effect as a release, from the want of an estate in possession in the releasee, or as a feoffment, from want of livery of seisin, may consequently be rendered valid as a bargain and sale by the averment and proof of a valuable consideration, although none is expressed in the writing." 2 Smith Lead. Cas. (8th Amer. Ed.) 534. And Chancellor Kent, while chief justice of the Supreme Court of New York, said, in pronouncing the prevailing opinion of that court in Jackson *v.* Alexander, 3 Johns. 484, 492: "The law from the beginning has been very indulgent in helping out deeds on the ground of consideration." And in his Commentaries he said: "Any words that will raise a use will, with a valuable consideration,

amount to a bargain and sale." 4 Kent. Comm. 496. These citations render it unnecessary to discuss the question as to what effect shall be given to the deed on trial. They make it clear that it passed the land by way of bargain and sale. The deed shows on its face that it was founded on a valuable consideration paid by the grantee; hence, if the deed shall be admitted in evidence, the fact that a valuable consideration was paid for the land will be established by proof inherent in the deed. No particular form of words is required to raise a use. Any words will be sufficient for that purpose which show an intention to convey. That such was the intention of the maker of this instrument is put beyond dispute by the words of the instrument itself. Effect must be given to the deed as a bargain and sale.

We now come to the question, has the deed been sufficiently proved to entitle it to be admitted into evidence? It was not acknowledged, but purports to have been executed in the presence of two subscribing witnesses. If it is an honest paper it was executed over 100 years ago. This great lapse of time puts it out of the power of the defendant to call the subscribing witnesses, or to produce any direct evidence of the authenticity of the signatures of either the subscribing witnesses or the grantor. All persons who could give such evidence we know must have been dead for years. The antiquity of the paper appears to me to be fully established. This paper itself furnishes, I think, very strong evidence of that fact. Its color and texture show that it is very ancient. Its water-mark indicates that it was made in the reign of one of the Georges. The spelling and style of penmanship are such as distinguish documents written near the beginning of the present century from those written at a more recent date. And the consideration mentioned in it, it will be observed, is expressed in a currency which, as a matter of history, we know was in use about the time the deed purports to have been made. It is undoubtedly true that all these things might exist if the paper had been forged, but there is no proof suggesting even a suspicion of forgery, and the law never presumes either fraud or crime. Besides, it is not to be supposed, as Judge Harper, of the court of appeals of South Carolina very pertinently remarked in Robinson *v.* Craig, 1 Hill, 389, 391, that "a deed would be forged with a view to a fraud to be committed at the end of 30 years." The motive which usually leads to crime is the hope of present gain. No motive of that kind existed in this case. Until quite recently the land in controversy was worthless, not capable of being used with profit for any purpose, a mere barren waste, lying between the waters of the Atlantic ocean and Barnegat bay. Nobody ever had possession of it

or exercised any acts of ownership over it until the latter part of 1880, when the defendant built a small house and some fence on it, which it subsequently caused to be removed. From the date of the deed until less than 12 years ago the land was regarded as without present or prospective value. In this state of affairs, it is impossible to believe that anybody would have expended the time and talent requisite in the perpetration of such a complicated forgery simply to place himself in a position where he might set up a claim to a worthless tract of land. But there is other evidence on this point. The deed on trial, it will be remembered, purports to have been made May 31, 1788, by John Curtis to Joseph Lawrence. Joseph Lawrence — Curtis' grantee — conveyed the same land to James Price by deed dated November 16, 1790. The latter deed, though purporting to have been executed in the presence of three subscribing witnesses, is unacknowledged, and the same objections are urged against its admission in evidence that are urged against the admissibility of the other. Joseph Lawrence, in his deed to Price, described the land which he conveys as that part of Sqan beach "which I bought of John Curtis, which was left to him by his father, David Curtis, deceased, which he bought of Elisha Lawrence, deed bearing date July 9, 1770." Now, although this description does not say in express words that John Curtis had made a deed to Joseph Lawrence, still I think it says so in substance and effect. What it says in plain words is that Joseph Lawrence had bought the land of John Curtis, and as this was said by Joseph Lawrence, in the instrument which he used to transfer the title to the land from himself to another, — in which instrument it will be observed that he describes another transfer of title by almost precisely similar words, namely, "which he bought of Elisha Lawrence, deed bearing date, etc., — there would seem to be no reason to doubt what Joseph Lawrence meant by the phrase, "which I bought of John Curtis," and what his grantee understood he meant, was that the title he was conveying was the same title that had been made to him by John Curtis by deed. The phrase, "under consideration" amounted, unquestionably, to a direct and positive assertion of title by Joseph Lawrence, and that he had acquired his title from John Curtis. This is sufficient, in my judgment, especially when considered in connection with the proof inherent in the paper itself, to justify the presumption that the deed on trial was in existence on the 16th day of November, 1790, when Lawrence conveyed to Price. A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will, after

the lapse of a long period, be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption. Fuller *v.* Saxton, 20 N. J. Law, 61, 65. James Price — Joseph Lawrence's grantee — conveyed the land in question to James Price, Jr., by deed duly executed and recorded in December, 1813. No allusion, however, was made in this deed to either of the two prior deeds. James Price, Jr., together with his wife, conveyed, in 1836, by a deed executed in due form of law, the land in controversy to James Johnson. A certified copy of this latter deed was put in evidence without objection. It refers, in express terms, to the deed executed November 16, 1790, by Joseph Lawrence to James Price. This reference establishes the antiquity of that deed. It shows that it was in existence more than 50 years ago. In my judgment the antiquity of both deeds is fully established.

But the mere fact that a deed is ancient will not of itself warrant the presumption that it is genuine and entitled to be admitted in evidence. Even according to the English rule, which seems to be somewhat more indulgent than that prevailing in this country, it is required that, in addition to proof of antiquity, there shall be evidence that the deed comes from the proper custody or depository to justify its admission in evidence. Lord Ellenborough, in Roe *v.* Rawlings, 7 East, 279, 291, said: "Ancient deeds proved to have been found among deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty." Stated in substance, the rule given by Phillips is this: If an instrument is 30 years old, and is proved to have come from a proper place of custody, it may be admitted in evidence without any proof of its execution. Such an instrument is said to prove itself. 2 Phil. Ev. 485. There is proof in this case that the deeds under consideration came from the proper custody. A son of James Johnson, to whom the land in controversy was conveyed in 1836, and who retained the title until 1880, swears that he saw the deeds in his father's possession as far back as he can remember. He was 38 years old at the time he testified. He also said that he had seen the deeds frequently during his father's life, and looked them over, but would not say that he had ever read them entirely through. He was sure, however, that they were the same two deeds which he had seen in his father's possession, because of certain distin-

tinguishing marks which he mentioned, and also because he found them among his father's papers after his father's death. He also testified that he delivered the deeds to the persons who afterwards passed them to the defendant. The foregoing summary shows, I think, that three facts tending to demonstrate the authenticity of the deed may be considered proved: *First*. That the deed had been in existence for nearly 100 years. *Second*. The possession of the deed by James Johnson, to whom the land was conveyed in 1836, warrants the belief that, whenever the title to the land changed, the deed was delivered to the person taking title as a muniment of his title. And, *third*, there have been three different assertions of title to the land under the deed, — the first in 1790, when Lawrence conveyed to Price; the second in 1813, when Price conveyed to Price; and the third in 1836, when Price conveyed to Johnson. The first of these, — that which was made in 1790, — it will be observed, was made so near the time when the deed on trial was executed that it is highly probable John Curtis heard of it. It is scarcely possible to believe that he did not. He was then living in the neighborhood where the transaction occurred. He did not die until 1812 or 1813. The deed of 1790 was executed in the presence of three witnesses. This fact shows that no effort was made to conceal its execution, but the effort was rather in the opposite direction, — to give publicity to it. Such transactions, even at this day, in sparsely-populated neighborhoods, attract public attention, and form the subject of conversation wherever men meet. This was undoubtedly the case in 1790, when such transactions were much less frequent than they are now, and when they doubtless excited much greater general interest than they do now. It thus appears, as I think, that when we come to take an account of the probabilities of the case, the mind is naturally led to believe, from the facts in evidence, that John Curtis must have heard of the conveyance of 1790, and that he did not attempt to defeat it, because he knew that Joseph Lawrence, in conveying the land, had simply done what he had a lawful right to do.

The rule as to what evidence, in addition to proof of antiquity and that the deed comes from a proper source, is required to justify the admission of an ancient deed in evidence, without proof of execution, is not entirely settled in this country. The cases are entirely harmonious to this extent: that where possession of the land has accompanied the deed, that fact furnishes sufficient evidence of its authenticity to justify its admission, but, where possession has not accompanied the deed, the cases are not entirely agreed as to what proof, other than proof of possession, will be sufficient to justify its admission. Professor

Greenleaf says that where possession has not accompanied the deed, to justify its admission there must be other equivalent or explanatory proof. 1 Greenl. Ev., § 144. The rule as thus stated seems to have met the approval of Chief Justice Green; for, in Osborne *v.* Tunis, 25 N. J. Law, 633, 663, he, in effect, said: The presumption that an ancient deed is genuine only arises in case the deed comes from the proper depository and is accompanied and followed by possession, or in case there is no other collateral proof to warrant the belief that the deed is genuine. Chief Justice Bronson, in Wilson *v.* Betts, 4 Denio, 201, 213, 215, said that other facts besides possession might be sufficient to raise the presumption that an ancient deed was genuine, but he thought that nothing would justify such presumption but acts done under the deed or the recognition of its validity by those having an interest in the other direction. What is called "explanatory" or "collateral proof" in some of the cases was defined in Jackson *v.* Laroway, 3 Johns. Cas. 283, 285, as follows: Such account must be given of the deed as may reasonably be expected under all the circumstances of the case, and as will afford a presumption that it is genuine. This definition has been approved in several cases. 2 Phil. Ev. (4th Amer. Ed.) 475, note 430, by Cowan & Hill. The Supreme Court of the United States, speaking by Judge Story, held, in Barr *v.* Gratz, 4 Wheat. 213, 221, that where a deed is more than 30 years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for, and it is admissible in evidence without regular proof of its execution. The rule, as thus stated, was reiterated by the same court in Coulson *v.* Walton, 9 Pet. 70, 72. The proof in support of the authenticity of the deed on trial comes up, in my judgment, to the required standard. Such an account has been given of it as was reasonably to be expected under the circumstances of the case, and as leads naturally to the presumption that it is genuine. Neither party has shown possession; on the contrary, both admit that the land has been vacant for a century, so that possession speaks neither for nor against the deed. But the proofs show that just such use has been made of it, and that just such claims have been made under it, as would, in the usual and ordinary course of such transactions among men at a very early day, have been made, had the persons dealing with it known it to be an honest paper. It has been dealt with, treated, and preserved as an honest and valid paper. In addition to this, as I think, the paper bears on its face strong evidence of its integrity. In my judgment, it should be admit-

ted in evidence, and full effect given to it. There is an interlineation apparent on the face of the deed. This, it is said, so greatly discredits it that no effect should be given to it. As originally drawn, the deed described the land conveyed as that undivided half of the one-seventh of Sqan beach which David Curtis left to his son John, without saying whether the half which it conveyed was the half of that seventh which Elisha Lawrence had conveyed to the testator, or the half of the seventh conveyed to the testator by Benjamin Lawrence. The half of the seventh conveyed to the testator by Benjamin Lawrence, it will be remembered, was devised to John absolutely, with an immediate right to possession, while the whole of the one-seventh conveyed to the testator by Elisha Lawrence was devised, in the first instance, to Elisha Curtis, and the heirs of his body lawfully begotten, with a limitation over to John of the one-half of that seventh, in case Elisha Curtis did not have an heir of his body. As originally drawn, the deed described the land which it conveyed as that half of an undivided seventh of Sqan beach which David Curtis left to his son John. With this description unchanged, there can be no doubt, I think, that the deed would have passed that half of the one-seventh in which John had a present absolute estate, and not the half of the other seventh in which his estate was liable to be defeated by the birth of issue to his brother Elisha. The interlineation changed this description, and made the deed say that the land which it passed was the half of that seventh part of Sqan beach which David Curtis bought of Elisha Lawrence by deed bearing date July 9, 1770. The effect of the interlineation was to change entirely the land upon which the deed was to operate, and to pass the grantee an estate, which, though vested, was nevertheless subject to a life-estate, and liable, in addition, to be completely destroyed by the birth of a child, instead of a present absolute estate which no future event could defeat. This fact would seem to make it as certain as anything can be, in the absence of convincing proof to the contrary, that neither the grantee nor any one claiming under him inserted the interlineation after the delivery of the deed. As to the land in dispute, the complainant's bill must be dismissed.

CHAPTER XXII.

DEEDS — THEIR REQUISITES AND COMPONENT PARTS, INCLUDING COVENANTS OF TITLE.

Buckey *v.* Buckey, 38 W. Va. 168; 18 S. E. 383.
Babcock *v.* Collins, 60 Minn. 73; 61 N. W. 1020.
Booker *v.* Tarwater, 138 Ind. 385; 37 N. E. 979.
Dreutzer *v.* Baker, 60 Wis. 179; 18 N. W. 776.
Wronkow *v.* Oakley, 133 N. Y. 505; 31 N. E. 521.
O'Neil *v.* Webster, 150 Mass. 572; 23 N. E. 235.
Magee *v.* Allison, — Iowa —; 63 N. W. 322.
Miller *v.* Meers, 155 Ill. 284; 40 N. E. 577.
Goodpasters *v.* Leathers, 123 Ind. 121; 23 N. E. 1090.
Lindley *v.* Martindale, 78 Iowa, 379; 43 N. W. 233.
Smith *v.* Westall, 76 Tex. 509; 13 S. W. 540.
Lake Erie & W. Ry. Co. *v.* Whitham, 155 Ill. 514; 40 N. 1014.
Oakes *v.* DeLancey, 133 N. Y. 227; 30 N. E. 974.
Miller *v.* Topeka Land Co., 44 Kan. 354; 24 P. 420.
Emeric *v.* Alvarado, 90 Cal. 444; 27 P. 356.
Probett *v.* Jenkinson, — Mich. —; 63 N. W. 648.
Prentice *v.* N. Pac. Ry. Co., 154 U. S. 163.
Doren *v.* Gillum, 136 Ind. 134; 35 N. E. 1101.
Gould *v.* Howe, 131 Ill. 490; 23 N. E. 602.
Copeland *v.* McAdory, 100 Ala. 553; 13 So. 545.
Eversole *v.* Early, 80 Iowa, 601; 44 N. W. 897.
King *v.* Kilbride, 58 Conn. 109; 19 A. 519.
Allen *v.* Kennedy, 91 Mo. 324; 2 S. W. 142.
Post *v.* Weil, 115 N. Y. 361; 22 N. E. 145.

Capacity of Grantor to Convey.

Buckey *v.* Buckey, 38 W. Va. 168; 18 S. E. 383.

Appeal from circuit court, Randolph County; Willian T. Ice, Judge.

Action by John J. Buckey against Charles N. Buckey, and two actions by the same plaintiff against Alpheus Buckey, to set aside three conveyances of land. The three cases were tried together, and plaintiff had decree annulling two of the conveyances. Charles N. Buckey appeals. Reversed in part.

Brannon, J. John J. Buckey brought three suits in equity in Randolph circuit court, — one against Charles N. Buckey, to annul a deed made by George Buckey to Charles N. Buckey, and two against Alpheus, to annul two deeds made by George Buckey to Alpheus Buckey — and, by a decree made in the three causes heard together, the deed to Charles N. Buckey and one of the two made to Alpheus Buckey were annulled. Charles N. Buckey appeals. John J. Buckey, in brief of counsel, alleges error in the failure of the decree to cancel the other

deed to Alpheus Buckey, and asks that in that respect the decree be reversed.

The ground of attack upon these deeds is incapacity in George Buckey, from old age, to make them. He died in 1888, aged 92 years. On September 10, 1883, when 87 years old he made a deed to Charles N. Buckey, conveying about twenty acres of land, on which stood a mill, Charles N. Buckey, being a grandchild, only son of Emmet Buckey. On September 18, 1880, George Buckey made to his son Alpheus a deed conveying to him a parcel of land embracing his residence and tanyard. On October 30, 1883, George Buckey conveyed to this same son, Alpheus, a parcel of seven acres of land and one-half of two lots in the town of Beverly. These are the deeds assailed in said suits. As it would answer no purpose of utility for future cases in a legal point of view, I shall not detail the many pages of evidence bearing on the mere question of fact of the mental capacity of George Buckey. George Buckey followed, during a long life, the business of a tanner. He was in business, industrious, prudent and successful. He was moral and religious, bore a good character, and, so far as I see, of regular, plain, temperate habits. He was a man of decided intelligence, and acquired a considerable property in real estate, though he was not wealthy. When he made these deeds he had living four sons and four daughters and a grandson, the son of his dead son. The evidence cannot be said to conflict as to specific facts, but, in opinion as to George Buckey's mental capacity to transact business or make these deeds, the numerous witnesses on the two sides widely differ. I can hardly say which on that subject might be said to have the preponderance. Perhaps in number there may be more on the side of his incapacity; but there are nearly as many on the other side, and when we look at the character of the evidence, the opportunity and means of observation, the business experience and capacity of the witnesses and their ability to judge as to the party's competency, I am impressed that the evidence to sustain competency is preponderating in force and weight. This is in my mind so, and would be most decidedly so, were it not for the evidence of Dr. George W. Yokum, a long-time neighbor, family physician, and intimate acquaintance of George Buckey, who is settled in opinion that he was incapable of making the deeds, because of "senile dementia intensified." But there is the son of Dr. George W. Yokum, Dr. Humboldt Yokum, a graduate of Jefferson Medical College, who from his childhood had known George Buckey, raised a close neighbor, seeing and conversing with him very often, and in July, 1882, made a settlement of his father's accounts with Buckey, and

took Buckey's note for the balance, and who expresses an opinion to the contrary. He is younger and less experienced than his father, it is true, but he seems intelligent and prudent in statement. I mention these witnesses because they are physicians, the only medical witnesses. The list of witnesses upholding George Buckey's mental capacity include the clerks of the two courts, a former sheriff, two notaries (one an attorney), and another attorney, all close neighbors and intimate acquaintances, whose business brought them in contact with all sorts of men, and rendered their opinions of special weight, and who had, through years, business with Buckey. A minister of the gospel, who was frequently at his house about the dates of the deeds, and had business, social, and religious conversation and intercourse with him, is also emphatic in favor of his competency. I have already said that there is very considerable opinion evidence to the contrary. It is shown that in June, 1878, George Buckey's wife died, and it had a very depressing effect upon his mind. He said to his son-in-law, "I am in trouble; I don't know what to do." This is urged as a strong reason to impeach the old man's competency. I regard it as not irrelevant, but by no means of decisive or telling import. The loss in old age of the partner of a long life would naturally cast dark and lowering clouds over the old man's short remnant of life, and render him oftentimes, when brooding over the change, vacant and oblivious to those things of the active, business world engaging the younger, but shut out at times from him. But this would be the case with any of us. It is to be expected. He did and said eccentric things. When his wife had been laid in her coffin for burial, he would have them to lay her on her side, and, a daughter having had the corpse changed back to its former position, he came into the room and did not seem to notice it. He stated that he was in Washington and saw Guiteau and President Garfield, when the latter was dead, and that Guiteau was a bad-looking man. He was not at Washington at all. This lamentable occurrence, the murder of President Garfield, possessed the mind of every person, month after month, during the illness of the president and the trial of his assassin. Is it strange that it engrossed this aged man's thoughts? It is an observed fact, entirely consistent with sufficiency of intellect to execute a valid deed, that the old frequently mistake fancy for reality, thinking they remember things never really in the memory as facts, but wholly the creation of imagination. On one occasion, standing on the new bridge over Valley river, he asked where the bridge was, and was told he was on it already, and that the old bridge had been burnt, when he remarked that

he might find it lower down the river, and went in search of it, soon returning, seeming to have recalled his recollection. He would sometimes be found sweeping out the old stable, saying he was going to stable horses in it, though it was disused and roofless, and supplanted by a new one near by. He remembered the old familiar bridge and stable so fixed upon his memory through years long gone. They inhered in his memory yet, and overcame his recollection of the new. It is common — quite usual — for the aged to remember the impressions and things of their long ago, and forget, for the time until they are specially recalled to their minds, recent occurrences. Sometimes, though not often, this aged man would be found wandering listlessly, somewhat vacantly, about his field near the town, and through the streets of the town of Beverly. There is nothing of much significance in this. He had for years labored in this field and walked the village streets among his neighbors, and he was still following his old walks and habits. When thus walking on one occasion, when his family wished him to come in, he became petulant, seeming to resent, as old people sometimes do, any hint that he was not himself as in days gone by. On another occasion he was found cutting weeds on the opposite side of the street from his house, seeming not to know it, and, when his attention was called to it, he at once returned across the street. He sometimes bade a colored woman living in his house good-bye, saying he was going to Frederick City, and then go to the tanyard and return. Sometimes he would tell her, when it was raining, to take the doors from the outhouses; that they would get wet. At times he would talk incoherently, especially in later years, after these deeds were made, and in an instance or two failed to recognize an old acquaintance, but his sight was bad, and this is common in age. When he was told who the person was, he seemed to sharply recall him, saying, "Why, is this Arch Chenowith?" I have given succinctly, the chief part, if not all, of the peculiar conduct of George Buckey, summoned in aid of the effort to overthrow his capacity. Strange conduct we may say it is. Eccentricity, or rather the idiosyncrasies of this peculiar person, they are, indicating, we may admit, failing powers under the hand of years of one who had walked so far down the other side of the hill of life; but with all this there is evidence to show continued good sense, intelligent conversation and discrimination, while the conduct above spoken of is occasional, only.

The strange actions just mentioned do not go far enough; they do not drown the excellent intelligence and common sense, the industry and careful earning and management of property

which characterized his long life. They do not deprive this sensible, worthy man of the right to bestow his property as he wished. Here we must remember certain legal principles. Amid all this evidence, pro and contra, they come in with the force of a casting vote, and sustain the validity of these deeds. If we look anywhere we shall find it laid down as law, particularly in Jarrett *v.* Jarrett, 11 W. Va. 584, and Kerr *v.* Lunsford, 31 W. Va. 661; 8 S. E. 493, that "old age is not in itself sufficient evidence of incapacity to make a deed;" and that the presumption of law is always in favor of the sanity, at the time the deed was executed, of a person whose deed is brought in question; the burden of proof is on him who asserts insanity, unless a previous condition of insanity has been established. Jarrett *v.* Jarrett, *supra;* Anderson *v.* Cranmer, 11 W. Va. 562, 584; Hiett *v.* Shull, 36 W. Va. 563; 15 S. E. 146. "This presumption is universal, and is not defeated by common report or reputation, or the imputation of friends or relatives, or the old age or feebleness of the subject, or, in short, by any cause except controlling evidence produced." Busw. Insan., § 159. The principle is sound in itself, and settled as a rule, that in the absence of fraud, imposition, or undue influence, mere weakness or feebleness of understanding is not sufficient to overthrow the party's deed. Aiman *v.* Stout, 42 Pa. St. 114; Cain *v.* Warford, 53 Md. 23; Miller *v.* Craig, 36 Ill. 109; Maddox *v.* Simmons, 31 Ga. 512, 528; 2 Lomax Dig. 298; Chancellor Kent, in Van Alst *v.* Hunter, 5 Johns. Ch. 160. Here I will say that no evidence shows, or tends to show, any fraud, undue influence, or even importunity, on the part of these grantees. Though alleged in the bills, there is not the slightest proof, and no contention of that kind is in the brief of counsel. The mental weakness must go further than it does in this case. The mysterious action of the person whose act was involved in Mercer *v.* Kelso, 4 Grat. 106, went beyond that in this case. "No degree of physical or mental imbecility which does not deprive the party of legal competency to act is, of itself, sufficient to avoid his contract." Farnham *v.* Brooks, 9 Pick. 212. It must go so far as to disable him from knowing and understanding the nature and effect of his act. 2 Minor Inst. 572; Bish. Cont., § 962. His mind may be weak and debilitated as compared to what it once was, the memory of things enfeebled, the understanding weak, the character and demeanor eccentric, and he may not have capacity to transact all the ordinary business of life, still, if he understands the nature of the act he does, recollects the property he is disposing of, and the person to whom he grants it, and how he desires to dispose of it,

his act is valid. Nicholas *v.* Kershner, 20 W. Va. 251; Kerr *v.* Lunsford, 31 W. Va. 662; 8 S. E. 493.

The case shows that, most of all things, George Buckey would remember his property. This is both likely and appears in the case. As showing that he knew his property and the objects of his bounty and the nature of his acts, these deeds do not reflect the scheme of Alpheus and Charles N. Buckey, but the sedate, deliberate, and long-entertained design of George Buckey himself. Time and again, for 25 years before these deeds, he said he intended to give his home property to Alpheus, and the mill property to Emmet Buckey. These declarations are admissble on the question of competency (Dinges *v.* Branson, 14 W. Va. 100, 118), and tend to show capacity (Whart. & S. Med. Jur., § 87). If crazy, he wonderfully retained, and finally executed to the letter his long-contemplated purpose. He said he intended to keep Alpheus with him as long as he lived; that Alpheus was kind and good to him. Alpheus remained with him till his death, while all the other children went off to do for themselves. He stated that Alpheus had lived with and cared for him all his life. He advanced his other children, or most of them, considerable amounts, and he left, outside these conveyances, a farm and other real estate of considerable value. As further showing strongly that he knew what he was doing, witness his caution as to the mill property. Many years before he placed Emmet in possession of it, and he carried on milling business there, and George Buckey always declared he intended the mill for him. About one year before the deed was made, the old man spoke to Mr. Jones about drawing the deed, but told him he wanted to run lines between the mill tract and one adjoining, and engaged to meet, and met, Jones on the ground, had the surveying done preparatory to the deed, and directed what land was to go into it. He at first said he intended to make the deed to Emmet; but Emmet became embarrassed financially, and with some reluctance, in a deliberate conversation with Jones, at last determined to make the deed to Emmet's only son, Charles N., saying he had been a good boy, and had been of great service to him. When the deed was read he declared it was correct. He had Mr. Wilson write one of the deeds he made to Alpheus, and a deed conveying two lots to a daughter, Mrs. Currence. He asked Wilson if he had the calls, and, he replying that he had not, he told who had conveyed the property, so that he could from the conveyance get the calls. Wilson suggested that he change his plan as to what lots he would convey to Mrs. Currence and what to Alpheus, but he refused to depart from his plan, giving good reason for it. And observe the prudence,

favoring his own safety, evinced by the deeds themselves. The deed to Charles N. Buckey and that to Alpheus for the tanyard and home reserve a life estate and full control to George Buckey for his life; and in the other deed to Alpheus he made a charge of $250 in favor of another son, Marteny, who he said had not received much. Another consideration is of great weight in favor of George Buckey's capacity. The two notaries who took his acknowledgments state that he was competent to make the deeds. There is no showing by any one present at their execution that at that time he was not competent. It has often been laid down that the very time of the factum of a deed is the critical point of time for inquiry as to the capacity of the party making it. "The evidence of witnesses present at the execution of a deed is entitled to peculiar weight." Jarrett *v.* Jarrett, 11 W. Va. 584; Anderson *v.* Cranmer, *Id.* 562; Nicholas *v.* Kershner, 20 W. Va. 251; Beverly *v.* Walden, 20 Grat. 147, 158. In Beckwith *v.* Butler, 1 Wash. (Va.) 286, it was held that the evidence of the subscribing witness as to competency to make a deed was "chiefly to be regarded," and President Pendleton spoke approvingly of a case in the Virginia court of appeals, where it overcame all other testimony before and after execution of the will. No taint or savor of incapacity is imputed to George Buckey save on account of old age. It has become quite common for interested relatives to assail the disposition made by aged persons of their property. He gave to Alpheus Buckey and Emmet's son, and perhaps Mrs. Currence, because he had not advanced them, and because they had remained near him and with him many years after they become adult, while others had gone far away. They had done much to rock the cradle of reposing age. He said so on many occasions, especially as to Alpheus. Whart. & S. Med. Jur., § 87, warns us "that great caution, indeed, should be used, lest the existence of extreme old age should lead the medical witness to presume consequent imbecility." Chancellor Kent said in Van Alst *v.* Hunter, 5 Johns. Ch. 159: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of natural affection dictated." Our conclusion is to reverse so much of the decrees

as annuls the deed to Charles N. Buckey, and dismiss the bills filed to annul it, and to refuse to reverse, but, on the contrary, to affirm that portion of the decree in the first case dismissing the bill filed by John J. Buckey to annul the deed to Alpheus Buckey, dated September 15, 1880.

Description of and Signature by Grantor.

Babcock *v.* Collins, 60 Minn. 73; 61 N. W. 1020.

Appeal from district court, Anoka County; Seagrave Smith, Judge.

Action by Phoenix Babcock and others against Martin F. Collins and others to have a deed, through which defendants claim title, declared void and for partition. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

CANTY, J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges that one Francis M. Babcock died testate, in 1872, and was at the time of his death the owner of an undivided one-tenth of certain real estate in Anoka County; that thereafter, on April 4, 1872, his last will was duly probated in the surrogate court in New York County, in the State of New York, where he resided at the time of his death; that Phoenix Babcock, one of these plaintiffs, and one John Babcock, were the executors named in said will, and that they then duly qualified as such executors; that, by the terms of said will, said executors were given authority at any time, whenever they deemed it advisable, to sell and convey the real estate left by said testator, or any part thereof; that thereafter, on the 23d of June, 1875, said executors made a deed of said land to one Thompson, which deed is set out, and by its terms it is the deed of "John Babcock and Phoenix Babcock, executors of the last will and testament of Francis M. Babcock, deceased, parties of the first part," to Thompson, and it is signed, "John Babcock, One of the Executors of the Last Will and Testament of Francis M. Babcock, Deceased," and by Phoenix Babcock in the same way. The deed recites that it is made in consideration of one dollar, and the complaint alleges that no consideration whatever was paid for it, but that it was procured by Thompson from the executors by means of false pretenses. It sufficiently appears that the defendants claim title through this deed and subsequent to conveyances. A part of the land has been platted and sold as

town lots, and there are forty-five defendants. The plaintiffs are the devisees under the will. It is further alleged that on July 6, 1891, said will was duly admitted to probate in said county of Anoka, in this State, and that there are no debts against said estate. The prayer of the complaint is that said deed from the executors to Thompson be set aside and declared void, and that the real estate be partitioned between plaintiffs and the defendants, who are owners of the other nine-tenths of the same.

2. The appellants contend that the deed from the executors to Thompson, having been made before the will was probated in this State, and before the executors had qualified and received letters testamentary from a probate court in this State, is void. On the other hand, the respondents contend that the will, having been since probated in this State, relates back, and takes effect from the time of the death of the testator, and validates the execution of the deed. Section 17, c. 47, Gen. St. 1878, provides that "no will shall be effectual to pass either real or personal estate unless it is duly proved and allowed in the probate court." However, it is well settled that the probate of a will relates back and gives effect to a deed made by a devisee before the probate. But it does not follow that such probate will relate back and give effect to the deed of an executor who acts merely as a trustee. Section 2, c. 50, Gen. St. 1878, provides that before entering on the execution of his trust, and before letters are issued to him, an executor shall give bonds; and section 5 provides that, if he neglects to accept the trust and give bonds for 20 days after the probate of the will, he shall not intermeddle or act as executor. At common law, an executor could do nearly all acts under the will before it was proved that he could do afterwards, and, when the will was proved, it related back and cured his acts. 1 Williams Ex'rs (6th Am. Ed.), p. 347, c. 1, § 2. But this is not the law in the American States having statutes similar to ours. 3 Redf. Wills, 21. See, also, Wiswell *v.* Wiswell, 35 Minn. 371; 29 N. W. 166. But this will was probated in the State of New York before the deed in question was made, though not in this State until afterwards. The provisions of our statute above quoted certainly do not apply with full force to the case of a foreign will duly probated at the place of the domicile of the testator in another State, or the executor duly appointed by the proper court at that place. It is well settled that, as far as the personal estate is concerned, such foreign executor has a right to intermeddle with the property and choses in action found in this State without proving the will or procuring letters in this State,

unless ancillary administration in this State is demanded by some local creditor or claimant entitled to demand it. And except where there are paramount local rights, such as those of local creditors, the law of the foreign domicile controls in the disposition of the personal property. Putnam *v.* Pitney, 45 Minn. 242; 47 N. W. 790; 1 Redf. Wills, *397, subsec. 7, note 4; *Id.* *409, subsec. 19, 20; Whicker *v.* Hume, 7 H. L. Cas. 124; Douglas *v.* Cooper, 3 Mylne & K. 378; Enohin *v.* Wylie, 10 H. L. Cas. 1. Our statute expressly recognizes the right of a foreign executor thus to intermeddle in the estate found in this State. Section 6, c. 77, Gen. St. 1878 (section 5917, Gen. St. 1894), provides that he may prosecute an action in this State in his capacity as foreign executor if, before commencing the same, he files in the probate court of the county in which the action is commenced an authenticated copy of his appointment as such executor; but it neither requires him to prove the will nor obtain letters in this State. But, while the statutory prohibitions above quoted do not apply to such foreign executor, it does not follow that he has any power or authority over the real estate in this State. While the personal estate is thus to be disposed of according to the law of the foreign domicile, the disposal of the real estate is governed wholly by the law of the State in which it is situated. But our statute clearly recognizes as valid and indisputable a foreign will thus duly probated at the foreign domicile, and the proceedings by which it is probated in this State are mostly a matter of form.

Chapter 47, Gen. St. 1878, contained the following sections: —

"Sec. 18. All wills, duly proved and allowed in any of the United States, or in any foreign country or State, according to the laws of such State or country, may be allowed, filed and recorded in the probate court of any county in which the testator has real or personal estate on which such will may operate, in the manner mentioned in the following section.

"Sec. 19. When a copy of such will and the probate thereof, duly authenticated, is produced by the executor, or other persons interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in the case of an original will presented for probate.

"Sec. 20. If, on hearing the case, it appears to the court that the instrument ought to be allowed in this State, as the last will and testament of the deceased, the copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court."

These are substantially sections 17, 18, and 19 of

chapter 62 of the Revised Statutes of Massachusetts of 1836, after section 19 thereof was amended by chapter 92 of Statutes of 1843 striking out a proviso that the statute should not be so construed as to make valid any will not executed, attested and subscribed according to the laws of that State. After this amendment, the Massachusetts court held that the statute gave the same force and effect to a foreign will as to a domestic will, if made according to the laws of the State or country where it was executed or probated, though not according to the laws of Massachusetts, and that such foreign probate was conclusive. Crippen *v.* Dexter, 13 Gray, 332. However, it is not necessary here to decide whether or not this court would hold, as that court did in that case, that such foreign probate is conclusive where the law of such foreign domicile required no notice of probate and none was given. But, at least, where such foreign probate was properly a proceeding *in rem*, our statute makes it conclusive as to the validity of the will, and the proceeding to probate it in this State is much in the nature of a suit on a foreign judgment. Not only is the foreign probate conclusive, but, as we construe it, the amendment added to section 21 of chapter 47 by chapter 64 of the General Laws of 1870 made the right of the foreign executor conclusive also. That amendment is as follows: "Letters testamentary or letters of administration with the will annexed may issue to a foreign executor or administrator with the will annexed, though not a resident of this State, upon filing a duly authenticated copy of his appointment and the bond given by him in the State or country in which it was originally proved; provided that the judge of probate before issuing such letter, may, in his discretion, require him to give bonds as in other cases." Before this amendment, and since the repeal of it by the Probate Code, the foreign executors had a right to appointment upon the ancillary probate here, unless, for some good reason, the probate court, in the exercise of its discretion, should refuse to appoint him. See In Re Hardin's Estate (filed this term), 61 N. W. 1018. Then this amendment must have been passed to give the foreign executor a more conclusive right. As we construe this amendment "may" meant "must;" and when the foreign will was probated at the domicile and the foreign executor was there appointed, his right to appointment here was conclusive on giving the bond, if one was required by the probate court.

The power to sell this real estate was not given by the court, but by the will itself, and is regulated as much or more by chapter 44, Gen. St. 1878 (sections 4301–4361, Gen. St. 1894),

relating to powers, as by chapter 47, Gen. St. 1878, relating to wills, or chapter 50, *Id.*, relating to executors. Under our statutes as they stood before the adoption of the Probate Code, it seems to us that after the will was conclusively established by the foreign probate and the executor qualified at the foreign domicile, he could, subject to the rights of local creditors, make a sale under the power in the will, which would become effectual when the formal act of probating the will here was performed. The execution of a power in a will does not stand on the same footing as the execution of a power given by the law. The power in a will is contractual, not statutory. See Holcombe *v.* Richards, 38 Minn. 38; 35 N. W. 714, for an illustration of this distinction. When a power in a will is defectively executed, equity will decree its proper execution. Section 57, c. 44, Gen. St. 1878 (section 4357, Gen. St. 1895); 1 Story Eq. Jur., §§ 170–175; 2 Pom. Eq. Jur., § 834. In the case of Newton *v.* Bronson, 13 N. Y. 587, the executor of a last will probated in New York, and containing a power of sale authorizing him to sell the testator's real estate in Illinois, made an executory agreement to sell the same. The court sustained an action for specific performance of the agreement. In the opinion by Denio, C. J., it is said: "It is argued that the defendant's office of executor does not extend to the lands in Illinois upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted. Schultz *v.* Pulver, 11 Wend. 372. Hence it is said the defendant cannot effectually perform the judgment of the Supreme Court, not being able, as is stated, to affect the title to lands out of this State. But the authority of the defendant in respect to real estate is not conferred by the probate court. He is the donee of a power at common law and under the statute; and although it was, by the will, made a condition to his acting under the power that he should qualify as executor, when he has performed that condition he acts in conveying the land as the devisee of a power created by the owner of an estate, and not under an authority conferred by the surrogate," — citing Conklin *v.* Egerton, 21 Wend. 430, 436. While the execution of such a power will be aided in equity, the defective or partial execution of a power created by law will not. 2 Pom. Eq. Jur., § 834. If the defective execution of a power in a will is thus aided by a court of equity, surely such defective execution must be good when it is cured without such aid. The deed here in question was but a defective execution of the power, but we are of the opinion that the subsequent probate of the will in this State related back and cured the defect. As said by Judge Story in Ex parte Fuller, 2

Story, 333; Fed. Cas. No. 5147, in discussing the Massachusetts statute, which is the same as ours (section 17, c. 47): "The section only provides that no will shall be effectual to pass real estate *unless* it shall have been duly proved, not *until* it shall have been duly proved." And he held in that case that, on being proved, it related back and gave effect to the prior conveyance. See, also, Spring *v.* Parkman, 12 Me. 127. In the case of Richards *v.* Pierce, 44 Mich. 444; 7 N. W. 54, after the will was probated and the executor appointed at the foreign domicile, he brought an action. It was held that the subsequent probate of the will in Michigan related back so as to enable him to maintain it. In the case of Crusoe *v.* Butler, 36 Miss. 150, the facts are very similar to the facts in the case at bar, and it was held that, after the will was probated at the foreign domicile, real estate in Mississippi could be sold under the power of sale, and that, when the will was subsequently probated in that State, it related back and perfected the sale. It was held that, "when the will was admitted to record in this State, it was merely for the purpose of authenticating the evidence by which the special power was established, and of rendering the prior right available here."

It does not appear by the complaint that letters testamentary were ever issued in this State to the executors. For the reason above stated, we are of the opinion that it was not necessary to issue such letters to perfect the prior exercise of the power of sale. At common law, the executor named in the will could exercise the power of sale of which he was the donee, though he refuse the administration. See Conklin *v.* Egertons, 21 Wend. 430, and cases cited. So, also, at common law, a sale of personal property by an executor before the proof of the will was cured by such proof, though he never qualified, but died before the will was proved. 3 Dyer, 367; Brazier *v.* Hudson, 8 Sim. 67. We are of the opinion that the subsequent probating of the will in this State related back and perfected the deed in question.

It is urged by appellants that the deed does not appear to be the deed of the executors as such, but merely their deed as individuals; that they did not sign it as executors, or so designate themselves in the body of the deed. It fairly appears that they intended to make the deed in their representative capacity. See section 50, c. 44, Gen. St. 1878 (section 4350, Gen. St. 1894); Warner *v.* Insurance Co., 109 U. S. 366; 3 Supt. Ct. 221; 18 Am. & Eng. Enc. Law, 931, notes.

The deed purports to have been executed in consideration of one dollar, and it is urged by the appellants that for this reason it is void on its face, being made by trustees in their represent-

ative capacity. Whatever might be said as to such a deed, if it appeared that the property attempted to be conveyed by it was at the time valuable, and parties interested had promptly repudiated it, this is not such a case. This deed was made for a one-tenth interest in 80 acres and two government lots. It might have been a partition deed, which the parties interested have procured or ratified. This deed was recorded in 1877, and remained of record unquestioned thereafter until this action was brought. Conceding, without deciding, that the nominal consideration expressed in it was a sufficient circumstance, for some reasonable time after it was made and recorded, to put a purchaser on inquiry, that time has long since passed. After it had remained of record for some years unquestioned, a person about to purchase under it had a right to conclude that there was no vice in the deed; that a sufficient consideration had in fact been paid, or it would have been attacked within a reasonable time; and he was justified in relying upon it. It is not claimed that these defendants had any knowledge that there was any fraud in the transaction, unless the face of the deed was sufficient to put them on their guard, and we are of the opinion that after such reasonable time it was not. The fact that plaintiffs did not know until the last three or four years that the deed had been procured by fraud is no reason why they should not be estopped as against innocent purchasers.

The order appealed from should be affirmed. So ordered.

Designation of Grantee in Deed.

Booker *v.* Tarwater, 138 Ind. 385; 37 N. E. 979.

McCabe, J. The appellants sued the appellee for partition of real estate in Sullivan County. Upon the issues formed, there was trial by the court without a jury and upon proper request the court made a special finding of the facts, and stated its conclusion of law in favor of the appellee, whereon he had judgment. It is contended that the court erred in its conclusion of law, and this is the only error assigned.

The substance of the special finding is: That on January 24, 1865, Bazzle Carrico was the owner in fee simple of the land in controversy (describing it), and that his wife, Francis, was living at the time. That at that time they had a son living, named Francis Carrico, who had three children living, named, respectively, Mary J., Truston, and Frankie, aged six, four, and one years, then living with their father. That on that day said Bazzle and wife made a deed purporting to convey said real estate "to

Francis Carrico's heirs," which deed was duly acknowledged and filed in the proper recorder's office on the same day (by whom it was so filed being undisclosed), and it was recorded August 9, 1867. That, when said deed was so left in the recorder's office, said Francis Carrico and his family, consisting of his three infant children and wife (their mother), moved upon and took possession of said lands, and farmed the same cleared parts thereof, and continued to so occupy the same until April 5, 1869. That Truston Carrico died in 1875, intestate, leaving surviving him, as his only heir at law, his father and mother, said Francis Carrico and wife, and his sisters, Mary J. and Frankie. That on September 5, 1875, said Mary J. Carrico intermarried with Henry Booker, and is the Mary J. Booker who is one of the plaintiffs (appellants). That said Frankie on August 16, 1884, intermarried with the plaintiff Robert Whitlock, and they had born to them, as the only issue of said marriage, one child, viz., Lizzie Whitlock, one of the plaintiffs (appellants herein). That said Frankie died intestate at said county in 1890, leaving as her only heirs said Robert, surviving husband, and said child Lizzie. That said Mary J., Robert, and Lizzie have not, nor have either of them, conveyed any interest in said real estate to any person or persons. That on April 5, 1869, said Francis Carrico, son of said Bazzle, claiming to be the owner of said lands by virtue of said deed from said Bazzle Carrico and wife to the heirs of said Francis Carrico, executed a warranty deed (his wife joining therein), for a valuable consideration, purporting to convey said lands to Josiah Carrico, who went into possession and occupied, claiming title to said land under said deed, until February 10, 1870, when he and his wife executed a warranty deed purporting to convey the same to Fountain Land. That said Land went into possession, claiming title under said deed, until the 13th day of November, 1872, when he executed a warranty deed (his wife joining) purporting to convey the same to Josiah Carrico for a valuable consideration. That said Josiah Carrico went into possession and occupied said land under said last-mentioned deed, claiming title thereunder, until the 26th day of September, 1874, when he executed a deed to John Crance (his wife joining therein), purporting to convey said lands to said Crance for a valuable consideration. That said Crance went into possession and occupied, claiming to own the same by virtue of said deed, until the 23d day of August, 1875, on which day he made a warranty deed (his wife joining therein) purporting to convey said lands to William G. Carrico for a valuable consideration. That he went into possession, occupied, and claimed to be the owner of said land by virtue of

said deed, until the 13th day of June, 1879, when he made a quitclaim deed (his wife joining therein) purporting to convey said lands to William A. Neal for a valuable consideration. That said Neal went into possession thereof, and while in possession he caused an abstract of title to said lands to be made; and said Neal was advised that he did not have a good title, legally, to said lands by virtue of said deed, because the deed of Bazzle Carrico and wife to the heirs of said Francis Carrico was void. That said Neal thereupon, pursuant to the advice of his attorney, for the purpose of perfecting his title to said lands, and securing a good legal title thereto, procured all the legal heirs of said Bazzle Carrico, then deceased, excepting Andrew L. Carrico, James H. Carrico, Sarah E. Purcell, and Francis Carrico, to execute quitclaim deeds purporting to convey their undivided interests in said lands to said Neal. That, further to complete and perfect his legal title to said lands, said Neal, on the 13th day of June, 1879, instituted a suit against said Andrew L. Carrico, James H. Carrico, and Sarah E. Purcell, heirs at law of Bazzle Carrico, deceased, in the Sullivan circuit court; said Neal claiming and alleging in his complaint in said suit that he and the said Andrew L. and James H. Carrico and Sarah E. Purcell were the owners of all said lands, as tenants in common,— the said Neal the owner of 39/42 thereof, in fee, as purchaser thereof from the heirs of said Bazzle Carrico, and each of the then defendants the owner of 1/42 part thereof, in fee, as heirs of said Bazzle Carrico, deceased. That such proceedings were had in said suit that said court adjudged said facts to be true as alleged in said complaint, and that said lands could not be divided without injury to the owners thereof; and the same were sold, under the order of the court, to said Neal, by a commissioner appointed by the court for that purpose, who executed a deed pursuant to said sale, which was approved and confirmed by the court. And said Neal thereupon continued in possession, occupied, and claimed to own said lands by virtue of his deeds from William G. Carrico, as remote grantee of Francis Carrico, as heir of said Bazzle Carrico, from the other said heirs and widow of said Bazzle deceased, and from said commissioner, until the 22d of January, 1880, when he (said Neal) executed a warranty deed (his wife joining therein) purporting to convey said lands to John H. Driver, who took possession, occupied the same under claim of ownership by virtue of said deed from said Neal until the 30th day of May, 1882, when he executed a like deed to another, who, in like manner, took possession under said deed, and occupied, claiming to own said lands by virtue thereof; and thereafter, through

numerous mesne conveyances from said Neal, each grantee going into possession under claim of ownership until the 21st day of August, 1891, the then holder under said mesne conveyances executed a warranty deed purporting to convey said lands to the appellee, William Tarwater, for a valuable consideration, who also took possession under said deed, and now holds possession of said lands, claiming title thereto by virtue of said deed. That each and all of said deeds were duly recorded in the recorder's office of said county within the time allowed by law therefor. That said Bazzle Carrico died in said county in 1870, and that said Francis Carrico had no grandchildren living on January 24, 1865, and no other children living, than said Mary, Truston, and Frankie. That said Truston at no time conveyed any interest in said lands. That said Francis Carrico died in 1886, intestate. The conclusion of law stated upon these facts is "that the defendant [the appellee] is the owner of the lands set out and described in the complaint, and entitled to the possession thereof, and that the plaintiffs [the appellants] take nothing by their complaint herein."

The question that lies at the threshold of the case is whether the deed from Bazzle Carrico to "Francis Carrico's heirs" conveyed any interest in the land to anybody. Strange as it may seem, counsel for appellants simply assert in their brief that "the deed from Bazzle Carrico to 'Francis Carrico's heirs,' of date January 24, 1865, conveyed the lands in controversy to Francis Carrico's children." No authority is cited to support this proposition, nor is there any attempt to support it by argument. Appellee's counsel seems to take it for granted that such a deed is valid and effectual to convey title to the children of Francis Carrico, and seeks to support the conclusion of the trial court on the sole the ground of adverse possession under claim of ownership in appellee and his grantors for more than twenty years prior to the commencement of the action. Ordinarily, twenty years after the right of action accrues for the possession of real estate, under the twenty-years statute, is a complete bar to such action, without such possession having been adverse. Rev. St. 1881, § 293; Rev. St. 1894, § 294; Vanduyn *v.* Hepner, 45 Ind. 589. But it has been held by this court that such defense does not apply to an action for partition. Peden *v.* Cavins, 134 Ind. 494; 34 N. E. 7; McCray *v.* Humes, 116 Ind. 103; 18 N. E. 500. It has also been held by this court that twenty years' adverse possession not only bars the action for possession, but also confers as complete a title as a written conveyance, even against a tenant in common, where the tenant in possession denies the right of his cotenant, and asserts

a hostile title. Bower *v.* Preston, 48 Ind. 367, and cases there cited. The theory of the appellant is, we presume, that the deed to Francis Carrico's heirs vested the title in his three children, and one of them Truston, having died in 1875, in infancy, unmarried, and without lawful issue, one-half of his third of the land descended to his father, Francis, and that thereupon the warranty deed previously executed by said Francis, by which he attempted to convey the whole of said lands to Josiah Carrico, inured to the benefit of said Josiah, vesting in him, by estoppel, that undivided one-sixth of said lands; and so on, with each successive grantee, down to the appellee. It is settled law that, by virtue of a warranty deed to the grantee, his heirs and assigns may, by estoppel and direct operation of law, become vested with a title acquired by the grantor after the execution of the deed. 19 Am. & Eng. Enc. Law, 1020–1022, and numerous authorities there cited. Hannah *v.* Collins, 94 Ind. 201; Loche *v.* White, 89 Ind. 492; Avery *v.* Akins, 74 Ind. 293. Whether this is the way appellants conclude that the appellees became clothed with the four twenty-fourth parts, which is one-sixth of said lands, their counsel have not seen fit to inform us. But we see no other way by which appellees can take any interest in said lands, if appellants' assumption is correct that the deed to Francis Carrico's heirs clothed the appellants with title, unless adverse possession for 20 years clothed appellee with the whole title. But it seems to us that appellants have been altogether too generous, in conceding to appellee the ownership of the one-sixth, or any other portion, of these lands, if the deed to Francis Carrico's heirs vested the title thereto in his children. Assuming that it did so vest the title, and conceding that the warranty deed of Francis Carrico to Josiah Carrico, attempting to convey to the latter the whole of the lands in 1869, inured to the benefit of said Josiah and his grantees, on the death of Truston, one of the children of Francis, by which one-half of Truston's third descended to his father, said Francis, yet such principle could operate no further than the deeds in the chain of title continued to be deeds containing covenants of warranty, or warranty deeds. The deed from Josiah Carrico to Crance is not shown to be the warranty, and the same is true of the deed from William G. Carrico to William A. Neal. A deed must be shown to be a warranty deed, affirmatively, before it can be held to operate as a transfer of an after-acquired title. Nicholson *v.* Caress, 45 Ind. 479. A quitclaim deed cannot have that effect. Avery *v.* Atkins, 74 Ind. 283; Graham *v.* Graham, 55 Ind. 23; Shumaker *v.* Johnson, 35 Ind. 33. If the special finding is correct and full, — and appellants, by excepting to the

conclusion of law, admit that it is so, — and if their assumption that the deed from Francis Carrico's heirs vested in them title to the land, then they had no cause for partition against the appellee, for he owned no part of interest in the land, unless he owned it all, by 20 years' possession by himself and grantors. If he owned it at all, by 20 years' possession, then the appellants had no cause for partition against him. If he did not own it at all, by 20 years' occupancy, and appellants' assumption be correct as to the effect of the deed of Bazzle Carrico, then appellants had no cause for partition against appellee, but rather a cause of action for possession. As before observed, that action is easier defeated by 20 years' continuous possession than it is to defeat a suit for partition by such possession. That may account for the seeming too great generosity of appellants in planting their suit on the theory that appellee owned one-sixth interest in the land, and asking for partition, instead of bringing an action for possession.

The conclusion we shall reach as to the effect of the deed from Bazzle Carrico makes it wholly unnecessary to decide whether the facts found make a case of 20 years' adverse possession in appellee and his grantors, thereby vesting in him title, and what effect his grantors' purchase of the supposed outstanding title from the widow and heirs of Bazzle Barrico had upon the adverse character of such possession, as against appellants, so ably presented in their brief. Nor need we decide whether the facts found make a case of no tenancy in common, and hence whether the 20 years' statute of limitations applies, and bars all right of appellants. If the deed from Bazzle Carrico to Francis Carrico's heirs was not effectual to convey title, then the title remained in Bazzle, and at his death descended to his heirs, his widow and children; and if that is the case the appellee's remote grantor, William A. Neal, as the special finding shows, purchased and received conveyances through deeds from the adult heirs, and by a partition sale and conveyance of the interests of the minor heirs of said Bazzle in and to all of said lands. At all events it is sufficient to say that, if that deed was invalid, then appellants have got no title, and have no right to complain, no matter what the conclusion was.

It was held by this court in Winslow *v.* Winslow, 52 Ind. 8, that a deed to the heirs of a living person, to take effect immediately, — exactly such a deed as the one here involved, — was void. In Lyles *v.* Lescher, 108 Ind. 382; 9 N. W. 365, Elliott, J., speaking for the court, seriously doubted the correctness of the decision in Winslow *v.* Winslow, *supra*, remarking that some of the authorities on which it was founded had since been over-

thrown, and others were not in point, but left the question open for further consideration, without deciding it. Afterwards, in Outland *v.* Bowen, 115 Ind. 150; 17 N. E. 218, Mitchell, J. (speaking for the court), directly affirmed the doctrine of Winslow *v.* Winslow, *supra*. In the still later case of Tinder *v.* Tinder, 131 Ind. 381; 30 N. E. 1077, it was held by Elliott, J. (speaking for the court), that this court was committed to the doctrine laid down in Winslow *v.* Winslow, *supra*, the court saying: "But, while it may be true that we are committed to the rule stated, it is also true that the court has manifested a purpose to restrict, rather than enlarge, its operation;" citing Lyles *v.* Lescher, *supra*. The court then goes on to hold that where there are any other words in the deed, from which it may be inferred that the grantors did not use the word "heir" or "heirs" in its strict, technical, legal sense, or that indicate that children were thereby intended, then the rule does not apply, and that effect will be given to the apparent intent. But here there are no other words in the deed to indicate any other intention on the part of the grantor than that he used the word "heirs" in its strict, legal sense. He may have meant "children," and he may have meant "heirs." This makes it wholly uncertain as to who the grantees were. If he had used words in addition indicating that he meant children by the word "heirs," that would have been certain enough, but he might have meant "heirs" in the legal signification of the word. If he did, then, in addition to the fact that a man cannot have heirs while he lives, it would always remain a matter of great uncertainty who the man's heirs would be until he dies; so that if he meant "heirs," in the legal signification of the word, it was void for uncertainty, and because he could have no heirs while he lives. But as we do not know whether he meant "heirs," in the legal signification of the word, or "children," the deed is equally void for uncertainty in the grantee. It follows from what we have said that the legal title to the lands in controversy was conveyed to the appellee, and that the appellants have no title whatever, and the conclusion of law to that effect was correct. The judgment is affirmed.

Want of Seal — How it Affects Validity of Deed and Proof of Consideration.

Dreutzer *v.* Baker, 60 Wis. 179; 18 N. W. 776.

TAYLOR, J. This action was commenced by the appellant in justice court to recover damages of the respondent for breaking

and entering the plaintiff's close, viz.: the N. E. one-quarter of the S. E. one-quarter of section 11, township 27, range 26 E., in Door County. The defendant put in a plea of title, and the cause was removed to the circuit court. On the trial in that court the learned circuit judge directed a verdict for the defendant, to which plaintiff excepted, and afterwards moved to set it aside, and for a new trial.

The learned counsel for the appellant insists that the circuit judge should have directed a verdict in his favor or, if not, that the case should have been submitted to the jury upon the evidence. Upon an examination of the evidence given on the trial, we are clearly of the opinion that the court erred in directing a verdict for the defendant. The evidence of plaintiff shows a regular chain of conveyances from the original patentee of the government to himself, and it further shows, or at least strongly tended to show, that he had been in the actual possession of said premises since the month of February, 1882, and that he was in fact in possession of the same at the time the defendant entered and did the damage complained of. The only defect in the plaintiff's title was that one of the intermediate conveyances under which he held his title, viz.: the deed from A. W. Lawrence to one Charity Pinney, was witnessed by but one witness and was not sealed. It was in form, however, a warranty deed, and acknowledged the payment of the whole consideration. After the receipt of such imperfect deed Charity Pinney conveyed by warranty deed to O. E. Dreutzer, and O. E. Dreutzer conveyed by quitclaim deed to the defendant, February 28, 1879; and claiming title under such chain of conveyances, the evidence strongly tends to show that the defendant took the actual possession of said land in February or March, 1882, and retained such possession until ousted by the defendant.

The evidence on the part of the defendant tends to show that Baker, the defendant, acting under the direction of George Pinney, made the entry complained of under a claim of title by said George Pinney. The title proved by Pinney was a tax deed from the county of Door to one J. Leathem, dated November 25, 1881, recorded the same day, and a quitclaim deed from Leathem, dated November 26, 1881, recorded September 11, 1882, to said George Pinney; and some evidence tending to show that Pinney took possession of said land by Baker, the defendant, who acted under and for him some time in December, 1881. Upon this showing, notwithstanding the imperfect deed in the plaintiff's chain of title, he clearly produced evidence tending to show himself entitled to the possession of the land in dispute as

against the original owner, and as against all other persons who could not show a better title. If the imperfect deed did not convey the legal, it did the equitable, title, and the right to the possession. That was so decided by this court in the case of Dreutzer *v.* Lawrence, 17 N. W. Rep. 423.

The only other question in the case was whether the evidence of title produced by George Pinney defeated this title and right of possession of the plaintiff. It is evident that this title of Pinney was not so clearly established by the proofs as to justify the court in deciding as a question of law that the plaintiff's title was defeated. The tax title under which Pinney makes claim was dated and recorded November 25, 1881, and being fair upon its face it was *prima facie* evidence of title in the grantee and in Pinney, who claimed under him. But the evidence strongly tended to show that the plaintiff went into the actual possession of this land in the month of February, at any rate as early as the forepart of March, 1882, and retained such actual possession until November 10, 1882, when Baker, acting under the orders of Pinney, attempted to oust him from the possession. If the jury had found this fact in favor of the plaintiff, as they might have done had the question been submitted to them, then, under section 1210*d*, Rev. St., as construed by this court, Pinney's title under his tax deed would have been defeated under the nine-months limitation. See Smith *v.* Sherry, 54 Wis. 114, 128; *s. c.* 11 N. W. Rep. 465; Haseltine *v.* Mosher, 51 Wis. 443; *s. c.* 8 N. W. Rep. 273; Lewis *v.* Disher, 20 Wis. 504; Wilson *v.* Henry, 35 Wis. 241. These cases clearly establish the rule that the actual possession of the lands covered by the tax deed for any considerable portion of the three years or nine months limitation, not only disengages the bar of the statute in favor of the tax deed, but creates a bar against it. The plaintiff's evidence tended to show, if it did not positively establish the fact, that he took actual possession of this land, claiming to own it, on or about the 1st of March, 1882, and within four months after the plaintiff's tax deed was recorded, and retained such possession until after the expiration of the nine months from the recording of the same, and, had the jury so found, the claim of title by Pinney would have been entirely defeated.

In an action like the one at bar, when the defendant pleads title in himself as a defense to an action of trespass to realty, the plaintiff having no opportunity to plead the statute of limitations in bar of the title set up on the trial, as a ground of defense, may show, in reply to the defendant's proof, any facts which will avoid and defeat the title proved by the defendant, and may therefore show that the title under his tax deed is

barred and defeated by the actual possession of the lands covered by the tax deed by the original owner, for a greater part of the time during the nine months immediately following the recording of such tax deed. Heath *v.* Heath, 31 Wis. 223, 228; Morgan *v.* Bishop, 56 Wis. 284; *s. c.* 14 N. W. Rep. 369; Gaus *v.* Ins. Co., 48 Wis. 108, 115; Waddle *v.* Morrill, 26 Wis. 611; Harris *v.* Moberly, 5 Bush (Ky.), 556; Mann *v.* Palmer, 2 Keyes (N. Y.),177, 188. Heath *v.* Heath, *supra*, was an action arising in a justice court, and as a part of his answer the defendant set up a counter-claim or set-off against the plaintiff. On the trial the plaintiff objected to the evidence of such counter-claim or set-off because it was barred by the statute of limitations. This court held that such an exception to the evidence was a good one. The reason for so holding is that in a justice court the only pleadings allowed are the complaint and answer. The plaintiff could not plead the statute of limitations to the defendant's answer, and was allowed, therefore, to avail himself of such statute upon the trial by then showing that the counter-claim was barred by the statute. The law which requires a party to plead the statute of limitations, in order to avail himself of its benefit, must be limited to cases in which, according to the rules of pleading prescribed by law, he has an opportunity to plead the same.

The question as to whether the plaintiff had actual possession of the lands in controversy for a considerable portion of the nine months next after the recording of the tax deed of Pinney, and so barred and defeated such deed under section 1210*d*, was clearly a question for the jury, and not for the court. It was error, therefore, to direct a verdict for the defendant.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Release of Wife's Dower by Agent Under Power of Attorney from Her.

Wronkow *v.* Oakley, 133 N. Y. 505; 31 N. E. 521.

Appeal from supreme court, general term, first department.

Action by Henry Wronkow against Hobart Oakley to foreclose a mortgage. A sale was made under foreclosure, and the purchaser thereof, Charles Wolff, filed a petition asking to be relieved from the purchase. From an order of the general term reversing an order of the special term denying the relief sought (19 N. Y. Supp. 51) plaintiff appeals. Reversed.

The opinion of Mr. Justice ANDREWS at general term is as follows: —

"The action was brought to foreclose a purchase-money mortgage for $5,000, dated September 2, 1890. The action was commenced October 22, 1891, and judgment of foreclosure and sale was entered December 22, 1891. By the terms of this judgment the premises were directed to be sold subject to a lease expiring May 1, 1898, and to a first mortgage for $17,019.22. The property was sold at auction on January 21, 1892, and the petitioner, Charles Wolff, was the purchaser, for the price of $5,600, over and above the incumbrances above mentioned; and said petitioner paid to the referee $560, 10 per cent on the amount of his bid, together with the auctioneer's and exchange fee, and signed the usual terms of sale. Subsequently a motion was made by the petitioner to be relieved from his purchase, and from the order denying such motion this appeal is taken.

"It appears that one Moritz Bauer became the owner of the equity of redemption of the mortgaged premises, by deed from Hobart Oakley, dated October 4, 1890. By deed dated October 20, 1890, executed by said Moritz Bauer in his own behalf, and also executed by said Bauer in the name of his wife, Cecelia Bauer, as her attorney in fact, such equity of redemption was conveyed to one Randolph Guggenheimer. The power of attorney, under which said Bauer acted as the attorney of his wife, was executed and acknowledged by her, and recorded in the year 1881. It describes both the parties thereto as being of the city of New York, and so likewise does the deed to Guggenheimer. Said power authorizes said attorney 'to contract for the sale of, and to grant, bargain, sell, and convey, all or any lands, tenements, or hereditaments or real estate to me belonging, situate, lying, and being within the United States of America, whether belonging to me individually or jointly with another or others, at public or private sale, for cash or upon credit, or partly for cash and partly upon credit; and for such price or prices, and upon such other terms and conditions, as to my said attorney may seem meet and proper; and for the purpose aforesaid, and in my name, place, and stead, as my act and deed, to sign, seal, execute, and acknowledge and deliver all necessary or proper contracts, deeds, conveyances, releases, releases of dower and thirds, and right of dower and thirds, or other instruments for the conveying, surrendering, and relinquishing all or any part of my estate, right, title, and interest, whether vested or contingent, choate or inchoate, therein.' Mrs. Bauer was not made a party to this action. It also appeared that certain persons had obtained judgments against

Moritz Bauer prior to the time that he acquired title to the property in question, and which, by orders of court, made also prior to Bauer's acquisition of title, had been marked, 'Lien suspended,' or 'Partially suspended upon appeal,' and that such persons were not made parties to this action.

"The objection to the title based upon the failure to make the wife of Moritz Bauer a party to the action presents the questions (*a*) of the power of a resident married woman to release her dower by attorney; (*b*) of her right, if she has such power, to make her husband her attorney for such purpose; and (*c*) whether the power of attorney, if otherwise valid, authorized the release of the wife's dower in after-acquired property and for a nominal consideration. These questions are important, because the decision of them not only affects the title of the property in question, but may affect many other titles. The Revised Statutes of this State contain the following provision: 'No act, deed, or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by the acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.' 4 Rev. St. (8th Ed.), p. 2456. It has been decided by the courts of this State that the only way in which a wife can release her dower during the life of her husband is by joining with him in a conveyance to a third person. Carson *v.* Murray, 3 Paige, 483; Elmdorf *v.* Lockwood, 57 N. 322; People *v.* Insurance Co., 66 How. Pr. 115; Ford *v.* Knapp, 31 Hun, 522. It has also been held by the courts of other States, under statutes similar to our own, that the wife must execute the release herself, and that she cannot release by power of attorney. See 5 Amer & Eng. Enc. Law, p. 914, and cases there cited.

"In 1878, however, the legislature of this State passed the following statute: 'Any married woman, being a resident of this State and of the age of twenty-one years or more, may execute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman.' The question presented for decision is whether, assuming that prior to the passage of this statute a married woman could not release her dower through an attorney in fact, this statute has authorized her to do so. It is suggested that the statute does not authorize a married woman to release her dower through an attorney, because the act provides that she may exe-

cute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman; and that the legislature in assimilating the case of the wife to that of the single woman could not have intended to authorize the former to act through an attorney in any manner in which the latter could not do so; and that as a single woman cannot, of course, ever be vested with such an estate, and cannot, therefore, appoint an attorney for the purpose of releasing dower, therefore a married woman cannot do so. We think this is too narrow an interpretation of the statute. It is a general maxim of the law that whenever a man *sui juris* may do of himself he may do by another, and the same maxim applies, of course, to a single woman. We think that the true interpretation of the statute is that just as a single woman can appoint an attorney to perform any act which she herself can do, so any act which can be done by a married woman of herself can be done by her duly appointed attorney; and, as a married woman can release her dower by joining with her husband in a conveyance of the property to a third party, she may perform that act through an attorney. It may be said that, as the legislature originally prescribed a particular way in which a married woman could release her dower, such special provision of the revised statutes should not be considered as modified or affected by the general provisions of the above-quoted act of 1878, which does not in terms refer to the release of dower, and which authorizes a power of attorney to be acknowledged in the same manner as if the woman executing the power were single. There would be force in this objection if the law in relation to acknowledgments of deeds and other instruments by married women had remained as it was when the revised statutes were adopted. It was provided in those statutes that the acknowledgment of a married woman residing within this State to a conveyance purporting to be executed by her should not be taken unless, in addition to the requisites required in the case of other persons, she acknowledged, on a private examination apart from her husband, that she executed such conveyance freely, and without any fear or compulsion of her husband. And the provision of the revised statutes above quoted, in regard to conveyances releasing the right of the wife to her dower, provided that the assent of the wife must be evidenced by the acknowledgment thereof, in the manner required by law to pass the estates of married women. It appears to have been considered by the legislature that these provisions, in reference to the manner in which conveyances executed by married women should be acknowledged, afforded great protection to them; but, whether such opinion was or was

not well founded, such provisions have been entirely swept away by later legislation; for, in 1879, the legislature passed the following statute: "The acknowledgment by married women, or the proof of the execution by married women, of deeds, or other written instruments, may be made, taken, and certified in the same manner as if they were sole; and all acts and parts of acts which require for them any other or different acknowledgments, proofs, or certificates thereof are hereby repealed. 4 Rev. St. (8th Ed.), p. 2489. As above stated, under the said act of 1879, acknowledgments of powers of attorney could be made by married women as if they were single; but, under said act of 1879, all acknowledgments of married women of the execution of deeds and other written instruments can now be made, taken, and certified in the same manner as if they are single, and the protection — if it was any protection — of married women in regard to their dower rights, and other rights in real property, afforded by the provisions as to private examination, has been entirely taken away; and, so far as the protection of such rights is concerned, it can make no possible difference whether the married woman releases her dower by joining with her husband in a conveyance, or whether she releases the same through an attorney appointed by her for that purpose. Nor do we perceive any good reason whatever why a married woman may not as well appoint an attorney to execute a deed, which releases her dower rights, as to execute such deed herself. The reason of the rule ceasing, the rule itself fails, and we think that the objection is not well taken.

"The second question raised is whether, if a married woman has the power to appoint an attorney to release her dower, she can make her husband her attorney for such purpose. We do not think this objection is well founded. It has been held that husbands and wives may legally contract with each other in reference to their separate estates (Owen *v.* Cawley, 36 N. Y. 600; Bodine *v.* Killeen, 53 N. Y. 90), that they may become agents for each other (Knapp *v.* Smith, 27 N. Y. 277), that a husband may assign to his wife a chose in action (Seymore *v.* Fellows, 77 N. Y. 178), and it has very recently been held that the common-law disability of a married woman to engage in a business as a copartner, or jointly with her husband, was removed by chapter 90 of the Laws of 1860 (Suau *v.* Caffe, 122 N. Y. 308; 25 N. E. Rep. 488). Under these decisions, if a married woman can release her dower rights through an attorney, as we think she can, we are of the opinion that she can appoint her husband such attorney.

The third question raised is as to whether the power of attorney given by Mrs. Bauer to her husband gave him the right to convey property acquired after the execution of such power. The power in question authorized Mr. Bauer to sell and convey all or any lands belonging to Mrs. Bauer situate within the United States. There is nothing whatever in the power which restricted it to lands belonging to Mrs. Bauer at the time the power was executed, and we think that it covers lands subsequently acquired.

"Another objection to the title is that certain judgment creditors should have been made parties to the action. On April 10, 1889, one King recovered a judgment in the court of common pleas for $2,299.54. On June 12, 1889, an appeal was taken from said judgment to the general term, and, upon the consent of the plaintiff and the sureties upon the appeal bond, the judgment was marked, 'Lien suspended on appeal;' and upon the record in the county clerk's office, where the judgment had been docketed, a similar entry was made. On February 5, 1890, the judgment of the general term was entered, affirming the above-named judgment, and for $117.67 costs. 8 N. Y. Supp. 466. Subsequently an appeal was taken from said last-mentioned judgment to the court of appeals. On July 2, 1890, an order was entered, suspending the lien of both judgments as to property on which said judgments were or might become liens. This order was entered by consent of the American Surety Company. On December 3, 1891, the lien was restored by proper entries in the judgment book, and on December 4, 1891, both judgments were assigned to the American Surety Company. Moritz Bauer took title to the property in question on October 4, 1890, and conveyed the same on October 20, 1890. The order entered on July 12, 1889, directing that the lien be suspended on appeal, did not, in terms, apply to after-acquired property. It is not necessary for the purposes of this appeal to decide, and we do not now decide, whether, under the various provisions, of the Code in reference to the suspension of the lien of judgments on appeal, this order suspended the lien of the judgment as to property acquired by Bauer after it was entered. It is not disputed that the order entered suspending the lien upon the original judgment, and upon the judgment for costs, at the general term, was entered upon the consent of the American Surety Company that such lien should be suspended, not only as to property upon which the judgments were then liens, but as to the after-acquired property. It is also undisputed that on February 4, 1891, both judgments were assigned to the American Surety Company, and

that that company only can raise an objection as to the regularity of the foreclosure, so far as relates to said judgments; and that company is estopped from raising such question by reason of consent above mentioned.

"Some question is also raised in regard to judgments recovered by one Healy; but, by an order of this court, entered on consent of the plaintiff, all the real property of Moritz Bauer (with an exception which does not include the property in suit) upon which said judgments were or might thereafter become a lien was exempted from the liens of said judgments; and such exception remained in full force at the time of recording of plaintiff's mortgage, and at the time of filing the notice of *lis pendens* herein. We are of the opinion that it was not necessary that either of the judgment creditors above should have been made parties to the action, and that the order appealed from should be affirmed, with costs."

PECKHAM, J. In relation to the question arising upon this application of the purchaser, Wolff, to be relieved from his bid at the judicial sale on the ground that the interest of the wife of Bauer had not been duly conveyed by virtue of her power of attorney to her husband, we are of the opinion that the order of the general term is erroneous, and for the reasons stated in the dissenting opinion of Mr. Justice Andrews at the general term. The limitation sought to be imposed upon such power of attorney, that it only authorized Mrs. Bauer's husband to sign his name to conveyances of lands belonging to her, is not, we think, sustained by the language of the instrument. Indeed, the learned judge who so held in his opinion at the general term, in order to arrive at this conclusion rejects as surplusage the language of the power which authorizes the husband to convey for her, and in her name and as her act and deed to sign, seal, execute, acknowledge, and deliver all necessary releases of dower and thirds. He construes the language used in the first part of the power as confining its application to the execution of a conveyance of any and all lands belonging to Mrs. Bauer, and he says the words "releases of dower" subsequently used, have no relation to the power actually granted, and hence are surplusage. We think, however, that the language as to "releases of dower" was used for the very purpose of authorizing the husband to do as he has done, and that the language of the first part of the power, when speaking of lands, etc., belonging to the wife, does not limit, and was not intended to limit, the operation of the words "releases of dower and thirds," so as to make them of no meaning or importance, but, on the contrary, it was intended by their use to confer authority on the husband to re-

lease her inchoate right of dower in lands belonging to him. Indeed she continues the statement of her purpose by inserting in the instrument a power to execute other instruments for the conveyance, surrendering and relinquishing all or any part of her estate, right, title, and interest, whether vested or contingent, choate or inchoate, therein. The language used in the first part of the power should not be held to operate all through it, and limit the otherwise plain meaning of the paper. We think there is no objection to the title arising out of the power of attorney given by the wife to the husband. She had the right to execute a power of attorney under the act of chapter 300 of the Laws of 1878, and in executing such power she could appoint her husband her agent or attorney in fact.

As to the objection that certain creditors by judgment against Bauer were not made parties, nor the sureties on certain appeal bonds, we think a sufficient answer is made by the fact of the entry of the memorandum by virtue of section 1256 of the Code of Civil Procedure, "Lien suspended on appeal." We think the meaning and purpose of the legislature in the enactment of that and the succeeding sections were to release the lien of the judgment so suspended on appeal in regard to all property upon which it otherwise would become a lien until the court orders that it be restored by a redocket. The sureties upon the first appeal to the general term consented to the entry of the order, which did not in terms provide as to subsequently acquired property, but, if we are right in our construction of the statute, it was not necessary to so state it in the order. The law itself provided for the fact. The sureties upon a further appeal taken to the court of appeals, consented in terms, to the order suspending the lien, including after-acquired property. Upon the affirmance of the judgment by the latter court, the sureties on the last appeal bond took an assignment of the judgments, and in their hands there was no longer any liability on the sureties on the first appeal. Such sureties became, on the giving of the second undertaking to pay the judgment, sureties for the second sureties; and when the second sureties payed or discharged their obligation to the owner of such judgments, and took an assignment of them they could not enforce them against the first sureties. Under these circumstances there is no reason on this ground for releasing the purchaser from his bid. The respondent here does not insist upon an objection that these questions were doubtful, and a purchaser ought not to be required to take such a title; but as we understand, if the questions above discussed should be decided in favor of the title, he

is willing to take it, although those who are not parties here would not be legally barred by our decision from hereafter raising the question. As our decision depends upon the construction of statutes, the rule of *stare decisis* would be effectual as an answer to any further claim, and we think the purchaser entirely justified in his waiver. Our conclusion is that the order of the general term should be reversed, and that of the special term affirmed, with costs in all courts. All concur.

Certificate of Acknowledgment not Conclusive.

O'Neil *v.* Webster, 150 Mass. 572; 23 N. E. 235.

Appeal from superior court, Suffolk County; Theodore M. Osborne, Judge.

Bill in equity by Honora O'Neil against Mary A. Webster, setting up that plaintiff, after an examination of the records, and finding the title all clear, purchased certain land of one Charles C. Kendall, and that defendant demands payment of $500, with interest, alleged to be secured by mortgage on said land, and that such mortgage had by a discharge, duly acknowledged and recorded, been released by defendant, and asking for an injunction against the enforcing of the mortgage. On hearing below, decree was entered for defendant, and plaintiff appealed.

W. Allen, J. The evidence shows that the defendant never executed the release of the mortgage and that her signature to it was forged. The plaintiff contends that the certificate of the justice of the peace, that the defendant acknowledged the deed, is conclusive that she executed it. The only use of the certificate of acknowledgment of a deed by a grantor is to entitle it to be recorded. It is familiar that the registry of a deed is not conclusive proof of its execution. When the original deed is the proper evidence, its execution must be proved as if it were not recorded. When a copy of a deed from the registry is competent, the registry is *prima facie* proof of its execution, but not conclusive. Samuels *v.* Borrowscale, 104 Mass. 207; Easton *v.* Campbell, 7 Pick. 10; Com. *v.* Emery, 2 Gray, 80; Pidge *v.* Tyler, 4 Mass. 541. It is then contended by the plaintiff that the defendant adopted the signature, and acknowledged the deed to be hers. But the evidence shows that the defendant had no knowledge of the discharge, and did not acknowledge any paper to be her deed; but that Kendall, the mortgagor, and the forger of the discharge, deceived the justice of the peace into believing that an acknowledgment to Kendall by the defendant that she had

verbally extended another mortgage was an acknowledgment that this discharge was her deed, and fraudulently induced the justice to attest her signature and to certify to her acknowledgment of the instrument before him. We cannot see that the mistake of the justice was caused by any negligence or fault on the part of the defendant, or that she is in any way estopped to show the truth. Decree affirmed.

Delivery Presumed from the Grantee's Possession of the Deed.

Magee *v.* Allison, — Iowa, —; 63 N. W. 322.
(Official report not yet published.)

DEEMER, J. Plaintiff is the daughter and sole heir at law of W. W. McHenry, who departed this life in November, 1889. McHenry was twice married, and plaintiff is the sole issue of his first marriage. He left surviving him, Charlotte L. McHenry, his widow, who was a sister of the defendants Allison. After the husband's death, the widow continued to possess and occupy the property in controversy, which was their homestead, until her death, which occurred May 4, 1892. On the 7th day of May, 1892, the defendant Lawrence Allison caused to be filed for record with the recorder of Winnesheik County a deed from W. W. McHenry and Charlotte L. McHenry, his wife, purporting to be executed and acknowledged on the 12th of December, 1887, conveying the property in controversy, with other lots and land, to Lawrence Allison. Afterwards, and on May 9, 1892, Lawrence Allison conveyed the property in controversy, by quitclaim deed, to his codefendant, Richard Allison. This deed was filed for record on May 14, 1892. Shortly after the death of W. W. McHenry, and in February of the year 1890, plaintiff filed a petition in probate, in which she recited that she was the sole and only heir of W. W. McHenry, and that Charlotte L. McHenry was his widow; that W. W. died seised of the property in controversy, and asked that C. L. McHenry be required to make an election as to which she would take, — homestead or dower in the premises. C. L. McHenry answered this petition by an election to take the property for life as a homestead, in lieu of her distributive share, and a decree was entered in accord with election. Administration was not had, however, upon the estate of W. W. McHenry, deceased. Immediately upon the death of the widow, the defendants took possession of the homestead under the deeds above set forth, and plaintiff thereupon commenced this action to quiet her title and set aside the deeds held by the defendants.

It is first insisted that the deed from McHenry and wife to Lawrence Allison, in so far as it covers the homestead in question, is a forgery. The deed covers various lots and parcels of land other than that in dispute, which were in the name of Charlotte L. McHenry; and it is claimed that the description covering the land in question was added to the deed after its execution and delivery by the McHenrys, and that it does not convey the homestead. That part of the description said to be a forgery is written in a different colored ink from that in the main body of the deed, and an alteration is apparent in this description. The alteration appearing upon the deed is fully explained by the scrivener who drew it, and he also explains how the writing appears in different colors in a fairly satisfactory manner. The only testimony relied upon to show the alleged alteration is from experts, some of whom were of the opinion that the description covering the premises in dispute was written after the main body of the deed, and certain other circumstances which it is claimed have a tendency to show that the deed is a forgery. The question as to what effect an apparent alteration of a written instrument has with reference to the burden of proof has recently undergone extended examination at the hands of this court in the case of Hagan *v.* Insurance Co., 81 Iowa, 321; 46 N. W. 1114. It is there held that an alteration apparent upon the face of a writing raises no presumption that it was made after delivery and without authority, and that the burden is not upon him who relies upon the instrument to explain the alteration, but upon him who attacks it to prove that the alterations were made after delivery and without authority. We need not do more than apply this rule to the facts of this case. When this is done it is manifest that plaintiff has failed to establish the alleged forgery.

2. It is next insisted that the deed to Lawrence Allison was never delivered to or accepted by him with intent to make it effectual, and that he never paid any consideration therefor. Delivery of a deed is, of course, essential to its validity; and, to constitute such delivery, there must ordinarily be, not only a manual change of possession, but an intention on the part of the grantor to make it operate as such, and an acceptance on the part of the grantee as well. It is well settled, however, that, if a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor and accepted by the grantee at the date of its execution. Wolverton *v.* Collins, 34 Iowa, 239; Craven *v.* Winter, 38 Iowa, 480. This presumption is not conclusive, but it raises a strong implication, which can only be overcome by clear and satisfactory proof.

Tunison *v.* Chamblin, 88 Ill. 379. Such a rule is necessary to the security of titles. Any other would render all holdings uncertain, and would be disastrous in the extreme.

In this case we not only find the deed to the lot in question in the possession of the grantee, but we have affirmative testimony from three witnesses that it was delivered to him by the grantor, through his agent, the scrivener who wrote it. As against this, the appellee relies upon circumstantial evidence which she claims points to the conclusion that the deed was surreptitiously obtained by the grantee and his brother, C. W. Allison, after the death of Mrs. McHenry. It is unnecessary that we set out the testimony relied upon. It is sufficient to say that nearly all these collateral facts with reference to the delivery of the deed can be explained upon a theory perfectly consistent with a delivery of the deed. Such being the case, the presumption arising from the possession of the deed in the grantee is not overcome. The testimony most relied upon to show there was no delivery is — First, the admission of Lawrence Allison that he did not take possession of the property, record his deed, or exercise any acts of ownership over the lot except to hold the deed until after the death of Mr. and Mrs. McHenry; and second, declarations made by Mrs. McHenry, after the conveyance, indicating that she understood and believed she owned the property or a homestead right in it after the death of her husband. With reference to this first-mentioned testimony, the defendant has offered an explanation which is entirely consistent with his claim that he owned the property at all times after the deed was executed. Mrs. McHenry was his sister and it is not unreasonable to suppose that because of this relationship he allowed her and her husband to remain in the possession of the property after he became the owner of it; and the fact that she remained in possession, paid taxes, and made repairs thereon is not of itself, under the circumstances disclosed, inconsistent with the claim that she parted with her interest in it by a deed to her brother. It is doubtful whether her declarations, made after she had relinquished her interest in the property by the deed to Lawrence Allison, to the effect that, after the death of her husband, she had some interest in it, are admissible. Concede that they are, they constitute no part of the *res gestae*. They were not so connected with the making and delivery of the deed as to indicate the character of the transaction. At most, such declarations, if admissible at all, are explanatory only of the possession of Mrs. McHenry, and are not sufficient to render ineffectual a solemn deed found after her death in the possession of the grantee. Williams *v.* Will-

iams (N. Y. App.), 36 N. E. 1053; Vrooman *v.* King, 36 N. Y. 482; Jackson *v.* Aldrich, 13 Johns. 106; Padgett *v.* Lawrence, 10 Paige, 170; Allen *v.* Kirk, 81 Iowa, 658; 47 N. W. 906; Bartlet *v.* Delprat, 4 Mass. 702. It is important to note that at no time did Mrs. McHenry hold the legal title to the premises. Before the death of her husband she had no interest except her inchoate right of dower, and the right to use and occupy the property as a homestead. After his death, she might have taken one-third of the premises in fee as her distributive share, provided no conveyance of it had been made. But this she did not avail herself of. She elected to take the whole for life as a homestead. These facts make the admission of her declarations even more doubtful than if she had at one time owned the fee.

3. It is further contended that the delivery of the deed to Lawrence Allison was conditional upon his surrendering to Mrs. McHenry a note for $9,443.00 executed by a partnership, composed of her husband and one C. W. Allison, during the lifetime of Mrs. McHenry. The deed is an absolute one, and bears no condition upon its face. It was sent by mail to Lawrence Allison by his brother C. W. Allison, who drew it at the request of Mr. and Mrs. McHenry. It was never deposited or intended to be left with any one in escrow. The rule, as we understand it, is that, if delivery of a deed is made to the grantee, it will be an absolute delivery, whatever conditions may be annexed thereto not incorporated in the deed itself; and title will immediately pass to the grantee. In other words, a deed cannot be delivered to the grantee in escrow. Tied. Real Prop., § 815; Fairbanks *v.* Metcalf, 8 Mass. 230; Worrall *v.* Munn, 5 N. Y. 229.

It is also said that there was no consideration for the deed; that the $9,443 was not delivered as agreed; and that the conveyance should be set aside. It seems to be well settled that, in the absence of fraud, parol evidence is admissible to show that there was no consideration for a deed for the purpose of invalidating it, when the deed recites a consideration on its face. See Gardner *v.* Lightfoot, 71 Iowa, 580; 32 N. W. 510.

4. It is also contended that the proceedings in probate in which Mrs. McHenry elected to take the premises as a homestead are a bar to defendant's claim; that the order therein made is conclusive upon defendants. It is difficult to see on what theory such contention can be sustained. Lawrence Allison was not a party to these proceedings, and had no knowledge of them. He was then holding a deed to the land from plaintiff's ancestor, which it is true was not recorded: but plaintiff, as an heir, is not a sub-

sequent purchaser under our recording statutes, and is not protected against unrecorded deeds made by her ancestor. Morgan *v.* Corbin, 21 Iowa, 117. As defendant Allison was not a party to these probate proceedings, he was not bound by the order made therein, even if it be conceded that the probate court had jurisdiction to determine the status of the legal title to the lot after the death of W. W. McHenry. This proposition is so plain that a citation of authorities seems unnecessary.

5. It is charged in the petition that W. W. McHenry, at the time he executed the deed, had not sufficient mental capacity to understand the nature and character of the transaction. This contention seems to be abandoned in argument. But we have examined the testimony bearing upon this issue quite fully, and do not think it establishes the allegations made in the petition.

6. Plaintiff's counsel vigorously contend that defendant Lawrence Allison fraudulently abstracted the deed to him from the papers of Mrs. McHenry after her death, and had the same recorded. While there are some suspicious circumstances connected with the case, we do not think the claim has been established. The evidence convinces us that the deed was duly delivered by the McHenrys during their lifetime; that it was their free and voluntary act, and that it was not forged and altered. The legal presumptions are all with defendants, and, as against these, we have nothing but suspicious circumstances which can all, or nearly all, be accounted for on a theory entirely consistent with the due delivery of the deed.

There are many collateral facts and circumstances in the case of more or less importance relating to the original acquisition of the lot, the relations of the parties, the consideration for various deeds covering the premises in controversy, as well as other lots and lands which we do not refer to. Our attempt has been to treat of the controlling questions in the light of all these collateral facts, and our conclusion is that the decree cannot be sustained. A decree will be entered in this court dismissing plaintiff's petition at her costs. Reversed.

Delivery to a Stranger.

Miller *v.* Meers, 155 Ill. 284; 40 N. E. 577.

Opinion by CARTER, J.

Plaintiffs in error, the seven children of William P. Bissell, filed their bill in equity in the circuit court of Will County against defendants in error, as executors and trustees under the last will of Martin C. Bissell, deceased, and against William

Grinton and others, to compel the delivery to complainants of a deed executed to them by said Martin, in his lifetime, for certain real estate situated in Joliet, called the "Bissell Hotel Property," and to confirm and establish the title to said property in said plaintiffs. William P. Bissell, also, was made defendant to the bill. The executors filed a cross bill to compel the cancellation and delivery to them of said deed, and also of a life lease executed at the same time by said Martin to said William P. Bissell and wife. Issues were made on the bill and cross bill, and on a hearing the circuit court decreed that the bill be dismissed, and that the relief prayed by the cross bill be granted, and that the complainants pay the costs. This writ of error is brought by the complainants to reverse that decree.

The principal facts set up in the pleadings and established by the proofs are, in substance, as follows: Martin C. Bissell, the owner of the property in question, resided in Joliet, and was a man of considerable wealth. His wife was living, but they had no children. He had permitted his brother William P. Bissell, the father of plaintiffs in error, who was possessed of small means, to occupy and run the hotel property for a number of years upon terms disclosed only by the testimony of said William, held by the court to be incompetent. The evidence does not, however, disclose that William had ever paid, or agreed to pay, any rent. In 1875, while William, with his wife and three minor children, were thus occupying the property, his adult children having established themselves in other parts of the country, Martin and his wife executed and acknowledged a warranty deed of the hotel property to plaintiffs in error, naming them, and as the children of said William, for the expressed consideration of one dollar and natural love and affection, and at the same time Martin executed and delivered to William and his wife a life lease to the same property. The deed recited that it was subject to the lease. The deed was drawn by the defendant, William Grinton, at Martin's request. Grinton also attested its execution, as a witness, and, as a notary public, took the grantor's acknowledgment. The certificate was in the usual form, certifying that the grantors acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein expressed. The lease was executed by Martin, as lessor, and William and his wife, as lessees; was delivered to William and his wife; purported to be for the term of their "natural lives," and upon the consideration that the lessees should pay all taxes, keep the premises in as good condition as when received, and keep the buildings insured, — three-fourths

of the insurance for the benefit of the lessees, and one-fourth for their children, the plaintiffs in error. The lease also contained the following: "And it is further expressly agreed by and between the parties hereto that in case said premises should at any time be sold for taxes or assessments, and said party of the second part should fail to redeem said premises from such sale at least three months before the time of redemption from said sale expires, or if said parties of the second part shall both at any time cease to personally occupy said premises (loss or damage by fire or inevitable accident excepted), then and in either of said last named events the said children of said William P. Bissell above named shall have the right, at their election, to declare said term ended, anything herein to the contrary notwithstanding, and the said demised premises, or any part thereof, to enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove, or put out, using such force as may be necessary in so doing. The deed and lease were dated January 11, 1875, but the acknowledgment was taken March 31, 1875. Some time in 1877, because of some domestic trouble, William's wife left him, and went to a distant city to live with her sister, taking some of their younger children with her, and about six months thereafter William left the premises, also, and removed to Chicago; he and his wife having permanently separated, and neither of them, nor their children, having since then occupied the property. When Martin C. Bissell and wife executed the deed to plaintiffs in error, he left it with Grinton, the notary, and told him to take it and take care of it, giving no other directions respecting it. Grinton put it in an envelope, and placed it in the safe in the office where he and Martin were engaged in business. He was then transacting business for Martin C. Bissell and himself under a contract by which he received a certain share of the profits. The private papers of each, as well as their partnership papers, were kept in the safe. Grinton retained possession of the deed until he produced it in court after the death of Martin C. Bissell, — a period of about 15 years. He testified that it had never been out of his hands since it was placed there by Bissell, the grantor; and it does not appear that any one ever asked him for the deed until it was demanded by plaintiffs in error, shortly before the filing of this bill. After William P. Bissell left the property, in 1877, Martin C. Bissell took charge of it, collected the rents, paid the taxes on it, and kept it in repair, the collections exceeding the disbursements by only a small amount. Plaintiffs in error claim this was done by agreement between him and his brother William, while defendants insist it was done as the owner,

in the exercise of his ownership of the property. Two witnesses (Stevens and Dirkman) testified that during this period Martin told them at different times that the property belonged to his brother's children. One of these witnesses, — an old neighbor of Martin's and who had formerly owned the property, — seeing that it "was running down," inquired of him about the property, and proposed to purchase it, but Martin told him he could not sell it; that it was not his; that he had deeded it to his brother's children, and had given his brother a life lease on it; that his brother had full control of it before he went to Chicago, but had allowed it to run to waste; and that he had paid the taxes for the benefit of his brother. One of these conversations, the witness testified, occurred seven or eight years before the trial, which took place in 1890, and the other five or six months before Martin's death. In the last conversation this witness, Stevens, asked Martin why William did not take care of the property; and the reply was that Willliam and his wife had parted, and he did not seem to take much charge of it. The other witness testified that some four years before the trial he was employed by Martin in whitewashing in the hotel. He was an elder or stewart in the African Methodist Episcopal Church, and was interested in procuring a site for a church, and suggested to Mr. Bissell the idea of letting him have the property so that he "could turn it over for a church," but that Mr. Bissell replied that he could not let him have it; that it was his brother's children's property, and he would attend to it. Two witnesses (Grinton and Vose) testified for defendants that, after William P. Bissell left the property, Martin C. Bissell turned it over, first to Grinton, and then to Vose, who took charge of it, kept the account of collections and disbursements, and carried it on the books in Martin's name, and in the same manner as other property of Martin's. Vose testified that Martin tried to sell it, and in 1885, talked of trading it for land in Virginia. Vose claims to have acquired an interest in the property, and had a suit pending against the executors to enforce it. Martin C. Bissell, by his will, after making various small bequests to plaintiffs in error and others, gave the bulk of his estate to defendants in error, in trust for certain religious purposes. The testator's property was not specifically described in the will.

The controverted question in this case is, did the title to the hotel property, subject to the lease to William P. Bissell, vest in plaintiffs in error by virtue of the deed of Martin C. Bissell and wife, or did the deed fail to take effect, because of non-delivery?

The first question to be determined is whether or not the trial court erred in admission of the testimony of the witnesses Olin and William P. Bissell. Judge Olin, who drew the will of

Martin C. Bissell, was permitted, against the objection of plaintiffs, to testify that the testator, in making up the list of his property to be included in his will, included in the list the hotel property and told him (the witness) that the provisions made in the will for plaintiffs were all he had given or intended to give him. The court had also, against the objections of the defendants, permitted the plaintiffs to prove by Wm. P. Bissell that he went into the possession of the hotel more than 10 years before the deed and lease were made, under the promise of his brother to give it to him for life, with remainder to his children, and that he retained possession under such promise, without paying any rent, until the lease was made, and that when he left it, in 1877, he arranged with his brother to lease and take care of the property. In both of these rulings the trial court erred. The defendants were defending as the executors and trustees under the will of the deceased, and William P. Bissell was a party, and interested in the event of the suit, adversely to the estate. While it is true that the bill did not, in terms, seek to establish the lease, yet it set up the lease, as well as the deed, and the deed, on its face, purported to be subject to the lease. As between the grantees in the deed and the lessees, no forfeiture had ever taken place under the lease. If William's testimony was true, instead of abandoning the lease, and surrendering the property to the lessor, he only made arrangements with his brother to take care of the property for him; and his brother's subsequent control of the property was not that of owner, but simply as agent for him, as lessee, and for his children, as the owners of the fee. The cross bill sought to have both the lease and the deed delivered up and canceled. Both issues were tried together. The court decreed in favor of the defendants, and thus annulled the lease. Had the decree been in favor of the defendants, the effect would have been to establish the subsisting validity of the lease, as well as of the deed, and the estate would have been diminished. He was clearly incompetent, under the statute.

The testimony of the witness Olin as to the statement of Martin C. Bissell made in his own favor long after the deed took effect, if it ever took effect, were also improperly received. The deed took effect in 1875, when it was executed, acknowledged, and delivered, if it ever was delivered. If the deed became effective in 1875, it would not be rendered inoperative by anything the grantor could say 10 years later. If it was a question to be determined from the evidence, as it certainly was, whether the deed did become effective or not in 1875, hearsay evidence, or the declarations of a party in interest, in his own

favor, made long afterwards, in the absence of the other party, could not be received to aid in determining such question.

Counsel for defendants, however, strenuously contend that this testimony was proper, as showing that it was not the intention of the grantor that the deed should take effect as a voluntary settlement, and cite the following cases in support of their contention: Cline *v.* Jones, 111 Ill. 568; Bovee *v.* Hinde, 135 Ill. 148; 25 N. E. 694; Barnum *v.* Reed, 136 Ill. 398; 26 N. E. 572; and Price *v.* Hudson, 125 Ill. 287; 17 N. E. 817, — which last case, it is insisted by counsel, is conclusive of the question. We find nothing in that case changing the rule long established. This court there said: "Any disposition made of the deed by the grantor, with the intention thereby to make a delivery of it, so that it shall become presently effective as a conveyance of a title, will, if accepted by the grantee, constitute a sufficient delivery. 3 Washb. Real Prop. 288–293; Benneson *v.* Aiken, 102 Ill. 284. The intention to deliver, on the one hand, and of acceptance, on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declaration — or both acts and declaration — of the parties constituting parts of the *res gestae*, which manifests such intention; and, in like manner, the presumption of a delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises. It is not competent to control the effect of the deed by parol evidence, when it has once taken effect by delivery; but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the nondelivery of the deed." Neither the facts in that case, nor the language used, warrant the inference drawn from the case by defendant's counsel, nor do the other cases cited lay down any different rule. As to whether Martin C. Bissell continued to deal with the property, and the grantees permitted him to continue to deal with it, as his own, after the execution of the deed, other witnesses were examined; but it was clearly erroneous to admit and consider the testimony of Judge Olin as to statements made to him by Mr. Bissell, when drafting his will, to the effect that he still owned the hotel property, and had never given it to plaintiffs in error. Guild *v.* Hill, 127 Ill. 523; 20 N. E. 665; Massey *v.* Huntington, 118 Ill. 80; 7 N. E. 269; Dickie *v.* Carter, 42 Ill. 377; Long *v.* Long, 19 Ill. App. 389; *Id.* 118 Ill. 638; 9 N. E. 247. These statements had no connection, either in time, place or circumstance, with the statements made to the witnesses Stevens and Dirkman to the effect that the prop-

erty belonged to his brother's children, and that he was attending to it for them and his brother, and did not tend to disprove such statements, as supposed by counsel. These latter statements were properly received as admissions by the grantor; as statements against his interest. They tended to show that he considered the deed as having taken effect, and that the title had vested in the grantees. They also tended to explain his acts in dealing with the property after having conveyed it.

But the question still arises whether or not, after considering all proper evidence and rejecting all held to be improper, the decree of the trial court can be sustained. "No particular form or ceremony is necessary to constitute a delivery" of a deed. "It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." Bryan *v.* Wash, 2 Gilman, 557; Cline *v.* Jones, 111 Ill. 563, and cases there cited. It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death, providing the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed. Bryan *v.* Wash and Cline *v.* Jones, *supra;* Reed *v.* Douthit, 62 Ill. 348; Walker *v.* Walker, 42 Ill. 311; Otis *v.* Beckwith, 49 Ill. 121; Masterson *v.* Check, 23 Ill. 72; Souverbye *v.* Arden, 1 Johns. Ch. 242; Bunn *v.* Winthrop, *Id.* 329; Scrugham *v.* Wood, 15 Wend. 545; Perry Trusts, § 103; Urann *v.* Coates, 109 Mass. 581; Thompkins *v.* Wheeler, 16 Pet. 114. And it was said in Walker *v.* Christen, 121 Ill. 97; 11 N. E. 893, that "the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done." The deed in question must have taken effect at once upon its acknowledgment and delivery to Grinton, or not at all; and the real question is with what intention was the deed placed in the hands of Grinton? Blackman *v.* Preston, 123 Ill. 385; 15 N. E. 42; Hayes *v.* Boylan, 141 Ill. 480; 30 N. E. 1041; Bovee *v.* Hinde, 135 Ill. 137; 25 N. E. 694; and cases *supra.* Nothing was said by the grantor at that time to indicate an intention that the deed should not take

effect. His instructions were to take the deed, and take care of it, — whether for himself or the grantees, he did not say. The grantees were his nephews and nieces, seven in number; the adults living in different places, and the minors, with their father, his brother, on the premises conveyed. Under the circumstances, it may have been a question of some difficulty, in his mind, to determine to whom the deed should be delivered. Instead of delivering it to either of the grantees, he could lawfully deliver it to a third person for their benefit. He did deliver it to a third person, and whether for their benefit, or only as a custodian for himself, is a question of fact to be determined from the evidence. Defendants insist that Grinton was the grantor's clerk, and that his possession was the possession of the grantor. It is not clear from the evidence what the business relations were between Grinton and Martin C. Bissell. Grinton testified that he was not employed by the day, week, month, or year; that he always had a partnership contract with Mr. Bissell in the profits, and that that was the case when these papers were executed; that the "partnership papers," as witness called them, as well as his individual papers and those of Martin C. Bissell, were all kept in the safe. Whether he was responsible for the losses and expenses of the business is not disclosed by the evidence. From the evidence given, he may have been a partner in business with Bissell, or merely an employee receiving a share of the profits as a measure of his pay for his services. In Lockwood *v.* Doane, 107 Ill. 235, this court held that: "Where partners agree to share in the profits of business, the law will infer a partnership between them in the business to which the agreement refers, but this presumption may be disproved. It is *prima facie* evidence, and will control until rebutted." Niehoff *v.* Dudley, 40 Ill. 406. Under the evidence and these authorities, it would seem that the relation between Grinton and Martin C. Bissell, at the time of the transaction in question, must be treated as that of a partnership. If so, the transaction not pertaining to their partnership affairs, possession of the deed by Grinton was not, by virtue of their relation, the possession of the grantor, but was the possession of a third person. Grinton took his deed, and placed it in an envelope, and put it in the safe, and kept it in his possession for 15 years thereafter, until the trial in the circuit court. Had Martin intended to retain control of it, he could as well have placed it with his own papers in the safe. This he did not do, nor did he ever assume or assert any control over the deed afterwards. Grinton was a notary public, and as such took the acknowledgment. By this acknowledgment the grantors

acknowledged that they signed, sealed, and delivered the instrument as their free and voluntary act, for the uses and purposes expressed in it. Whether, on an issue as to the delivery of a deed, otherwise left in doubt by the proofs, such an acknowledgment would be sufficient evidence of a delivery, it is not necessary in this case to decide; for, as we conceive, the intention of the grantor is otherwise disclosed by the evidence with sufficient clearness, and this, too, whether Grinton was a partner or a mere employee of Martin C. Bissell. We find nothing in the attending circumstances denoting an intention on the part of the grantor that the deed should not take effect; but on the contrary, there is sufficient evidence that he intended the deed to become presently effective. He at the same time executed and delivered to his brother, the father of plaintiffs in error, and to his brother's wife, who were already in possession of the property, a life lease therefor. The deed was, on its face, made subject to the lease. By the lease the lessees were required to insure the property for the benefit, in part, for themselves, and in part for the grantees. The lease recognized the grantees as the owners of the property, and, for breach of any of the covenants in the lease, they were authorized to declare the term ended, and to enter, and expel the lessee. The lease and deed were executed together, and were parts of the same transaction, whereby Martin C. Bissell disposed of all his interest in the possession of and title to the property. He reserved nothing in either the lease or deed. The delivery of the lease to, and the possession of the property by, William, are not disputed. The right to declare a forfeiture and to re-enter was not reserved to the lessor, but to plaintiffs in error, the grantees in the deed. It would seem from this provision that, at the time of the transaction, Martin C. Bissell intended that the title should vest in appellants; and that he understood it did so vest. Then, again, it was clearly proved that after William had left the property, and Martin had taken possession and made repairs, he leased it, paid the taxes, and, to all outward appearances, acted as the owner. He told two witnesses that the property belonged to his brother's children, and that he could not, for that reason, sell or dispose of it, but would attend to it — evidently meaning that he was taking care of it for his brother and his brother's children. It may be that after the lapse of years he concluded that he was entitled to and would retain the property as his own. In other words, he may have changed his mind in reference to making a gift of the property to these beneficiaries, honestly concluding that under the circumstances he had a right to do so, but if he

did so conclude he was simply mistaken as to the legal effect of what had been done. The facts are somewhat similar to those in Douglas *v.* West, 140 Ill. 461; 31 N. E. 403. See, also, Winterbottom *v.* Pattison, 152 Ill. 334; 38 N. E. 1050. We are satisfied from the evidence that Martin C. Bissell intended that the deed should take effect when he executed and acknowledged it and delivered it to Grinton, and it must be so held. The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the cross-bill, and to enter a decree in accordance with the prayer of the bill of plaintiffs in error. Reversed and remanded.

Escrow.

Goodpasters *v.* Leathers, 123 Ind. 121; 23 N. E. 1090.

MITCHELL, C. J. The facts specially found by the court show, *inter alia*, that on the 4th day of February, 1878, James Madison Leathers, being the owner of a certain tract of land, executed a deed in substance as follows: "This indenture witnesseth that I, James Madison Leathers, of Morgan County, in the State of Indiana, convey and warrant to Phebe Tucker Leathers, my wife, and Florence Mabel Leathers and James M. Leathers, Junior, on condition of the support of Phebe T. Leathers, their mother, off of said lands described below, in Morgan County, in the State of Indiana, for the natural love and affection I have for said above parties, the following real estate in Morgan County, in the State of Indiana, to wit." Then follows a description of the land, the formal attestation clause, and an acknowledgment of the instrument in due form. The court stated, as a conclusion of law, that the above conveyance vested in Phebe Tucker Leathers, wife of the grantor, an estate for life in one-third of the lands described therein, and that the fee to the whole estate was vested in Florence M. and James M. Leathers, charged with the support of their mother. We do not concur in this conclusion. The land is granted to the three grantees therein named in plain and unambiguous language. The effect of the deed was to vest an estate in fee-simple in the mother and two children as tenants in common, each taking an undivided one-third, and to charge the income from the whole with the support of the mother. Stout *v.* Dunning, 72 Ind. 343; Williams *v.* Owen, 116 Ind. 70; 18 N. E. Rep. 389; Commons *v.* Commons, 115 Ind. 162; 16 N. E. Rep. 820, and 17 N. E. Rep. 271. The intention of the parties is what the law addresses itself to in the construction of deeds,

but the intention is to be gathered from the language found in the instrument. The entire deed is to be regarded, and when the language is unambiguous, and the intent plainly appears upon the face of the instrument, there remains nothing for the court to do but to give the deed effect according to the terms written therein. There is nothing in the circumstances of the present case which justifies a construction of the deed so as to give it a meaning different from that which arises upon the face of the instrument.

Cross-errors are assigned, and in support of these it is suggested that the court committed error in holding certain answers sufficient, because it is said it appears from the answers that the deed in question was never delivered by the grantor in his lifetime. The facts pleaded do not sustain this view of the case. It appears from the answers that the deed was duly signed and acknowledged by the grantor in his lifetime, and that it was deposited by him with a third person, with instructions to deliver it to his widow after his death, and that it was delivered to her accordingly. Where a grantor signs and acknowledges a deed, and deposits it with a third person, to be delivered by him to the grantee at the death of the grantor, without reserving to himself any right to control or recall the instrument if the deed is afterwards delivered to the grantee the title passes, and the deed ordinarily takes effect, by relation, as of the date of the first delivery. Smiley *v.* Smiley, 114 Ind. 258; 16 N. E. Rep. 585, and cases cited; Owen *v.* Williams, 114 Ind. 179; 15 N. E. Rep. 678. The court erred in its conclusions of law. The judgment is reversed, with costs, with instructions to the court to restate its conclusions of law in consonance with this opinion, and to render judgment accordingly.

What Constitutes Notice When Deed is Not Recorded.

Lindley *v.* Martindale, 78 Iowa, 379; 43 N. W. 233.

Appeal from district court, Polk County; Marcus Kavanagh, Jr., Judge.

Plaintiff filed her bill in equity to set aside a mortgage executed by Bayard T. Lindley to Mary M. Martindale, to restrain the sheriff from making a deed in pursuance of the foreclosure of said mortgage, and to quiet the title in her to 380 acres of land in Guthrie County, Iowa, conveyed by said mortgage, on the alleged ground that appellant was the owner and in possession of said lands at the time the mortgage was made, and that the same was made without her knowledge or consent. The facts, as

shown by the evidence, and necessary to be noticed, are that appellant was married to Elwood Lindley prior to 1857, and received soon after from her father's estate about $500 in money and property, which was used in the family; that in 1865, her husband gave her a team of horses, which continued to be used in the family as heretofore, until some time after when the same were exchanged for 160 acres of wild land, near Stuart, the title to which was taken in her name, and the value of which was materially increased by the construction of the Rock Island Railroad so that it was afterwards sold for $33 per acre. With the proceeds of this sale, block 3, consisting of 12 lots, and lot 11, block 17, in Stuart, was purchased. A dwelling was erected and occupied by the family on lot 3, and a stone building on lot 11, which was occupied by Elwood Lindley as a drug store. The title to all these lots was taken in Elwood Lindley. In 1874 he conveyed the store property to the plaintiff and in the same year the plaintiff secured a divorce from him and decree for the title to lot 11 and all of block 3, the homestead of the family. There being judgments against Elwood Lindley that were liens on part of this property, appellant's brother, John Carter, bought the lots at sheriff's sale, and took mortgages from the appellant, which she afterwards paid. In 1876 appellant and Elwood Lindley were remarried and lived together until 1884. In 1876 lot 11 was exchanged for 200 acres of the land in question, and in the spring of 1877, a house was built on said land, and occupied by the Lindley family. The title to this 200 acres was taken in Bayard T. Lindley, the son of appellant, who lived with the family and was then about 18 years of age. The family continued to live in said house until the fall of 1884. In 1882, James Callanan sold by contract to Bayard T. Lindley 120 acres adjoining said 200 acres, Elwood Lindley conducting the negotations; and in the same year Elwood Lindley contracted with Mr. Comstock for the other 40 acres in controversy. In 1882, Bayard T. Lindley and his wife executed a warranty deed to appellant for the 100 acres on which the family residence was situated, but which was never placed on record. After his marriage, in 1882, Bayard T. Lindley resided in a house on the land purchased from Callanan. In June, 1884, Elwood Lindley called upon Edward Martindale, agent for his wife, Mary M. Martindale, to secure a loan of $5,000 on all the lands in controversy, and a few days thereafter Edward Martindale visited and examined the lands. Elwood Lindley's family were then residing in the same home, and Bayard T. Lindley on the Callanan tract. The plaintiff had been partly blind since 1865. The management and cultivation of the lands had been by Elwood Lindley, and their son,

Bayard Lindley, from the time they were purchased. A loan of $5,000 was consummated on the 12th day of July, 1884, Bayard T. Lindley and his wife executing the mortgage upon the whole of the lands in controversy to Mary M. Martindale therefor. The moneys received by the loan were applied in part in paying for the lands purchased from Callanan and Comstock, and in paying mortgages placed on the other land by B. T. Lindley. Bayard T. Lindley lived in the family of his parents on the 200 acres from the time they moved there until his marriage, in 1882, after which he lived on the Callanan land until after the visit of Mr. Martindale. These facts appear with but little, if any, controversy. There is controversy as to whether plaintiff knew that the title to the 200 acres was placed in her son. In her original petition she alleged "that she caused the legal title to said lands, as she purchased the same, to be made out in favor of the said B. T. Lindley, then about eighteen years of age." In an amendment, filed after the cause had been submitted, she alleges that the title was placed in B. T. Lindley "without the knowledge or consent of either the said B. T. Lindley or the said plaintiff," and that neither knew the title was so placed until long afterwards. Also it is questioned whether she knew of the execution of the mortgage to Mrs. Martindale, and whether Martindale was told at the time of his visit to the farm that it belonged to Mrs. Lindley. Plaintiff bases her claim for relief on the grounds that, the title to the 200 acres being vested in Bayard T. Lindley without her knowledge, a trust resulted in her favor, and that he held it in trust for her; that, she being in actual possession at the time of the execution of the $5,000 mortgage, Mrs. Martindale and her agent were bound to take notice of her rights in the lands; and that, the mortgage being executed without her knowledge or consent, she is not bound thereby.

Given, C. J. 1. Appellee presents several questions as to the state of the record, and as to whether there is an appeal as to the defendant B. T. Lindley. We think the merits of the case are fully presented in the record before us, and, as B. T. Lindley has appeared and filed his argument, we have considered the case upon its merits without passing upon these questions.

2. As title to lot 11 (the store-house property in Stuart, which was given in exchange for the 200 acres) was decreed to plaintiff in her divorce proceedings, we do not inquire back of that in determining whether it was the plaintiff's means that purchased the 200 acres.

3. The weight of the testimony is in favor of the conclusion that neither the plaintiff nor B. T. Lindley knew at the time of

the conveyance that the title to the 200 acres was placed in B. T. Lindley. She was at the time at least partially incapacitated by blindness from transacting business, and this, as well as most of the other transactions, was managed by her husband with her consent. It is evident, however, that she became aware of the fact that the title was in her son long before the execution of the mortgage in question. Her means having paid for the land, and the title being made to the son without her knowledge, the law will imply a trust in her behalf.

4. The doctrine contended for by appellant, that the purchaser of real estate takes the same charged with notice of the equities of the parties in possession at the time of the purchase, is well settled in this State. Phillips *v.* Blair, 30 Iowa, 649, and authorities cited. Such possession "must appear affirmatively to have been open, visible, exclusive, and unambiguous; such as is not liable to be misunderstood or misconstrued. 3 Washb. Real Prop. 284. All these lands had been cared for and cultivated either by Elwood or B. T. Lindley for a long time prior to Mr. Martindale's visit. At the time of his visit, Elwood Lindley, who was negotiating the loan, and his family were residing on the 200 acres, and B. T. Lindley on the Callanan tract adjoining. It would certainly not appear from this state of facts, to one who had been told that the title was in B. T. Lindley, that his mother, Mrs. Lindley, was in the open, visible, exclusive, and unambiguous possession of the land. The reasonable inference would be that B. T. Lindley, who held the title, was in possession. Where husband and wife occupy real estate together, the inference would be in the absence of further information, that it was the husband's possession. Thomas *v.* Kennedy, 24 Iowa, 397; Trust Co. *v.* King, 58 Iowa, 598; 12 N. W. Rep. 595. In this case the question was as to whether the property was in the possession of Mrs. King or her son. The court held that the legal possession was in Mrs. King and her husband. Where mother and son occupy the property, the same inference as to possession does not arise as where occupied by husband and wife. In the case of King, it was shown that at the time and after the mortgage was executed Mrs. King was in the actual possession and occupancy of the property but it was insisted that her possession was not such as to impart notice to the world of her equities. The property consisted solely of lot and dwelling thereon, wherein Mrs. King, her husband, and family resided. The court say it was a legal possession in Mrs. King and her husband. We think the facts in this case fail to show such a possession in the plaintiff and her husband.

Instead of a single lot and dwelling we have several parcels of land with different dwellings, lands that had been cultivated and used by others than the plaintiff, and without any apparent authority from her. In Thomas *v.* Kennedy, *supra*, there being no building upon the land, the husband was upon the ground assisting and directing, apparently for himself, the fencing and breaking of the land; no one knowing by any public declaration or act, or otherwise, that the work was being carried on for the wife, nor that the possession taken was for her. The court say: "We are not prepared to hold that under such circumstances third parties would be affected with notice of the wife's possession. In other words, they could as well, and indeed more reasonably presume that the possession was that of the husband as of the wife; and it would be carrying the doctrine of notice to an unusual extent to hold that the world was, without more, bound to know that he was in possession and making improvements for her. From the facts of the case one knowing the relations of the parties and nothing as to title, would infer that Elwood Lindley was in possession, and knowing the title to be in B. T. Lindley, would infer that he was in possession. It is contended that Mr. Martindale had actual notice that the lands belonged to Mrs. Lindley. Elwood and B. T. Lindley both testified that, at the time Mr. Martindale visited the farm, Elwood Lindley told him, "in substance, that he would find the title all right in B. T. Lindley, but the farm in fact belonged to Mrs. Lindley." This statement is denied by Mr. Martindale. The truth of this matter is not necessarily determined by the number of witnesses. We think the fact that Martindale, a lawyer, versed in such transactions, made the loans as he did for his wife, without any inquiry or action with reference to the rights of plaintiff, satisfies us that he never understood such a statement to be made. We are not convinced that such a statement was ever made to Martindale. We conclude, therefore, that Martindale made the loan without any knowledge, actual or constructive, of Mrs. Lindley's equities in the land.

5. Assuming, for the purpose of further inquiry, that Mrs. Lindley's possession was such as to put Mr. Martindale upon inquiry, we inquire whether, in permitting the title and control of the lands to remain in her son, as she did, she is not now estopped from asserting her title against Mrs. Martindale's mortgage? She permitted her son, Bayard, to cultivate the lands, and dispose of the crops as his own for some time. The deed to Bayard for the 200 acres was executed October 17, 1876. December 7th following, he mortgaged to Farwell for $700; to Helliker, June 1, 1880, $1,200; a second

mortgage to Helliker, June 1, 1880, $120; to Dewey, July 18, 1882, $982; and to Martindale, executed June 19, and recorded July 17, 1884, $5,000. The plaintiff knew of the execution of the mortgage to Farwell December 7, 1876, and thereby learned that the title to the 200 acres was in her son, Bayard. She permitted the title to so remain, and her son to exercise control as he did, and to make these mortgages, without in any way disclosing to the world any claim upon the property. Her husband, whom she had at least permitted to act for her in all matters, with her son, who had the legal title, secured $5,000 of Mrs. Martindale's money that went to pay for and remove incumbrances from the lands in question, without any actual notice that Mrs. Lindley claimed any interest in the land. It would be most inequitable to allow Mrs. Lindley, under these circumstances, to enjoy the benefits of this loan without any return to Mrs. Martindale. Mrs. Lindley put it in the power of her son to procure this money from Mrs. Martindale, most of which went into the land. Mrs. Martindale made the loan in good faith, and, if either must suffer, it must be the one who made it possible for Bayard T. Lindley to effect a loan upon the lands which he did not own. These conclusions render it unnecessary to notice other points made in the record. The decree of the district court is affirmed.

General Description of Property, when Sufficient.

Smith *v.* Westell, 76 Tex. 509; 13 S. W. 540.

Commissioners' decision. Appeal from district court, Brazoria County.

Action by T. L. Smith, executor of Thomas G. Masterson, against A. E. Westall and another, to recover a tract of land. Plaintiff appeals.

COLLARD, J. No specific property is described in the deed to Rowe. The property conveyed is "all that certain tract or tracts, parcel or parcels, of land by me inherited, by, through, or from my deceased parents, Henson G. Westall, my father, and Harriet Westall, my mother, situated in the county of Brazoria or State of Texas, and all right that I now have, have had, or may have to any estate or property that is or might be due me, whether real, personal, or mixed, in this county or State." An explanatory clause follows in these words: "This conveyance is meant to convey and carry with it every possible interest that I now have or may have to any property in this county, or

any other county in the State of Texas." The deed contained a general warranty.

It is a general rule that a deed must be construed so as to give effect to all its parts, if it can be done. Hancock *v.* Butler, 21 Tex. 804; Pugh *v.* Mays, 60 Tex. 192; 3 Washb. Real Prop. 398. The deed before us makes at least two grants: First, all lands inherited by the grantor from his deceased father and mother, without qualification or restriction; then, of all other property, real and personal, he owned, had owned, or might own, derived from every source. The next part of the grant was intended to declare that every possible interest in any property owned or held by the grantor in the State was to pass. It was intended to enlarge, rather than to limit, the grant. It was not intended as a more particular designation of the property, and to limit the conveyance to such estate only as the grantor then owned, or to have the effect of quitclaiming the property.

It is insisted by appellant that Rowe was not an innocent purchaser, because the consideration paid by him was an antecedent debt. The fact stated is true, that the consideration was a debt due to Rowe; but it was not a debt due by Westall, but a debt due by one Bates to Rowe, — Bates at the same time surrendering to Westall a claim against him for the same amount, $500. We think that this was a valuable consideration, and one that will support the plea of innocent purchaser. Bates gave Rowe no guaranty; was in no way responsible to him if the title failed, or the interests in the estates purchased proved to be of no value. Rowe surrendered a valuable right, was in a worse position than before, and therefore entitled to protection as an innocent purchaser having no notice of the former conveyance to Masterson. Paddon *v.* Taylor, 44 N. Y. 371; Ayres *v.* Duprey, 27 Tex. 493, 607. The description in the deed was sufficient, and it passed all lands in the State vested by inheritance in Westall at its date. Baxter *v.* Yarborough, 46 Tex. 231; Harvey *v.* Edens, 69 Tex. 420; 6 S. W. Rep. 306; Bitner *v.* Land Co., 67 Tex. 341; 3 S. W. Rep. 301. We conclude the judgment or the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment affirmed.

Two Conflicting Complete Descriptions of Property.

Lake Erie & W. R. Co. *v.* Whitham, 155 Ill. 514; 49 N. E. 1014.

BAILEY, J. This was a suit in ejectment brought by Eugene H. Whitham against the Lake Erie & Western Railroad Company

to recover a strip of land forty or fifty feet in width, and 965 feet long, lying between the north line of blocks 13 and 14 in the village of Rankin, Vermilion County, and the north line of the S. E. $\frac{1}{4}$ of section 11, township 23 N., of range 14 W., being a part of the land claimed by the defendant as its right of way. The suit was brought November 29, 1892; the declaration consisting of one count, which describes the premises and alleges that the plaintiff is the owner thereof in fee simple. The defendant pleaded "Not guilty," and at the trial which was had at the May term, 1894, of the circuit court, a verdict was rendered finding the defendant guilty, and finding that the title to the premises established by the plaintiff was in fee simple. Upon this verdict the court, after denying the defendant's motion for a new trial, gave judgment in favor of the plaintiff, and the defendant now brings the record to this court by appeal.

It appears from the evidence that the village of Rankin was laid out and platted about November 14, 1872, and that the plat, with the accompanying certificates, was filed for record in the office of the recorder of Vermilion County, November 28, 1872. The railroad in question, of which the defendant is now the owner, is located near the north line of the land in controversy, and seems to have been built and in operation before the plat of the village of Rankin was filed for record; it having been built by a railroad company of which the defendant is, or claims to be, the successor. At the point in question the railroad runs east and west, and is crossed by Main street, — a street running north and south, — near the center of the village. At the time the village was platted, William A. Rankin and David Rankin, for whom the village was named, owned the W. $\frac{1}{2}$ of section 12, on which that part of the village east of Main street was platted, while George Guthrie owned the N. E. $\frac{1}{4}$ of section 11, or all that part of the plat lying west of Main street and north of the railroad, and the heirs of Stanton S. Johnston, deceased, owned the S. E. $\frac{1}{4}$ of section 11, being that part of the land included in the plat lying west of Main street and south of the railroad. The evidence tends to show that at the time the village of Rankin was platted there was great rivalry between Rankin and a small place about a mile and a half further west, known as "Pellsville," as to which should secure the railroad station, and that the owners of the land embraced in Rankin were disposed to offer very considerable inducements to the railroad company for the purpose of securing the station for their own village. William A. Rankin seems to have been employed by the Johnston heirs in platting their part of the village, and the evidence tends to show that they agreed to give him each alter-

nate two lots throughout the plat, if he would secure the station; that Rankin, acting for the Johnston heirs, had the surveying done, some of the heirs being present, and one or more of them assisting in making the survey. The evidence further tends to show that the proprietors of the several tracts of land to be included in the plat instructed the surveyor to leave sufficient ground on each side of the railroad track to make, with the right of way already acquired by the railroad company, a strip 100 feet in width, and that, in pursuance of such instructions, he surveyed and laid out the grounds, and made the plat so as to leave 100 feet on each side of the railroad through the entire village; and there is evidence tending to show that it was the intention of the parties that the ground so left should be railroad ground, and should be occupied and used for railroad purposes. The strips of land thus left not being "marked or noted on the plat as donated or granted" to the railroad company, it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company, under the provisions of section 3 of chapter 109 of the Revised Statutes; but it is contended on behalf of the company that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts of the parties, tends to establish a common-law dedication of the land to the company, for its use as a part of its right of way. This contention, which raises one of the principal questions presented by the record, will be more fully noticed hereafter. The plaintiff, to establish title in himself to the lands in question, offered in evidence certain proceedings in chancery between the heirs of Stanton S. Johnston, deceased, for partition, in which it was alleged in the bill, and found by the decree, that Stanton S. Johnston, in his lifetime, was seised of an equitable estate in these lands, by virtue of a contract for the sale thereof to him by the Illinois Central Railroad Company, and that after his death certain deeds were executed, by which the legal title was conveyed to his heirs. Evidence was also given, not only that his heirs were thus claiming title in fee to the land, but that before the village of Rankin was laid out and platted they were in possession of it. The plaintiff then offered in evidence quitclaim deeds to himself from each of the heirs of Johnston, purporting to convey to him all their right, title, and interest in the land. Several specific objections to these deeds were raised, all of which were overruled, and the deeds were read in evidence. The decisions of the court overruling these objections are now assigned for error.

Harriet M. Hutchinson is one of the heirs of Johnston, and one of the deeds offered in evidence purports to be executed by

Joseph M. Hutchinson and Harriet M., formerly Harriet M. Johnston, his wife, party of the first part, to the plaintiff, party of the second part, and in which the party of the first part, for a certain consideration therein mentioned, conveys and quitclaims to the party of the second part all interest in the land in question. It is objected that, because the name of the wife is placed after that of her husband, it will be intended that she joined with her husband merely for the purpose of waiving her dower, and not for the purpose of conveying her estate. It is sufficient to say that, even if such intendment could arise under other circumstances, it is completely negatived here by the very terms of the instrument, since she appears in the deed as one of the parties conveying and quitclaiming all interest in the land. To hold otherwise would do violence to the express language of the deed.

Again, it is objected that the certificate of acknowledgment is insufficient because the officer before whom the acknowledgment was taken, though describing himself in the body of the certificate as a notary public, omitted to write the name of his office under his official signature. As he professes, in the body of his certificate, to be a notary public, and to be acting officially, we are of the opinion that the omission of the words "Notary Public" after his signature cannot have the effect of rendering his certificate invalid. His official character and the fact that he was acting officially, we think, sufficiently appear. The objections to this deed were properly overruled.

A deed from William A. Rankin and Mary D. Rankin, his wife, bearing date November 23, 1892, was objected to on the ground that the certificate of acknowledgment bears date December 2, 1892 — the latter date being after the suit was commenced. The presumption is that the deed was delivered on the day of its date, and the fact that the certificate of acknowledgment bears a later date is not sufficient to rebut such presumption. Deininger *v.* McConnell, 41 Ill. 227; Jayne *v.* Gregg, 42 Ill. 413; Blake *v.* Fash, 44 Ill. 302; Hardin *v.* Crate, 78 Ill. 533. There is evidence tending to show that the deed was executed and acknowledged in a different county from that in which the plaintiff resided, and that its execution was procured for him by his attorney in that county; and while he testifies that it did not come into his personal possession until after it was acknowledged, there is no evidence of that furnished by the dates appearing upon the instrument itself, tending to show the date of its delivery to his attorney. To rebut the presumption of its delivery on the day of its date, it was necessary, under these circumstances, to produce some evidence as to the

time of its delivery to the plaintiff's attorney, and there being none, the presumption cannot be said to be rebutted.

It is next claimed that the deed from Jane M. Johnston, William O. Johnston, Scott Johnston, and Martha E. Johnston to Benjamin R. Cole conveyed the interest of the grantors in only a part of the land in controversy, and consequently that the plaintiff has failed to show that he has become vested with their title to the residue. This deed purports to convey and quitclaim all the interest of the grantors "in the following described real estate." Then follow two descriptions, by metes and bounds, the land lying between block 14 and the north line of the quarter section. The other description, which in the deed appears in a separate sentence, is as follows: "Being all that part of above-described quarter section lying between the north line of said quarter section and blocks thirteen and fourteen in the village of Rankin." Here are two descriptions, each complete in itself, one embracing only that portion of the quarter section lying north of block 14, and the other that portion lying north of both blocks. It seems plain that under these circumstances, effect must be given to the larger, as well as to the more restricted description. Such interpretation does no violence to either, but gives full force to both. Were there any necessary incongruity between the two the more restricted description might perhaps be rejected, so long as the conclusion fairly arises from the entire instrument that the grantors intended to convey their interest in the whole tract; but, there being no such incongruity between them, nothing need be rejected, and all parts of the description may be retained and given force.

It is also claimed that the deed from Cole and wife to the plaintiff is not shown to have been delivered before the commencement of the suit. That deed bears date November 23, 1892, and the certificate of acknowledgment is dated November 29, 1892. The suit was brought on the date last named, and the plaintiff testifies that the deed was received by him directly from Cole, and that he received it the day it was acknowledged, but that it came to his hands before the suit was commenced. His testimony upon this point is sought to be weakened on his cross-examination by eliciting from him the fact that he, on the day the deed was received, was in Rankin, while the suit was commenced at Danville, and, therefore, that he could not have known the exact time of the issuing of the summons in the suit. He, however, persists in saying that according to his understanding the suit was not commenced at Danville until after the deed was delivered to him at Rankin; and, there being no evidence

to the contrary, we think his testimony, while not very satisfactory, is sufficient to show, *prima facie*, that the deed came to the plaintiff's hands before the summons in the suit was issued.

It is contended in the next place that the verdict and judgment for the plaintiff are unsupported by the evidence, because the plaintiff failed to deduce his title from the United States, or any other original source of title. It is claimed, on the other hand, that a *prima facie* title is shown, by deducing title from the Johnston heirs, who are shown to have been in possession of the land, claiming title in fee. The plaintiff also sought to bring his case within the provisions of section 25 of chapter 45 of the Revised Statutes. Upon the trial he stated on oath that he claimed title from the Johnston heirs, and that, as he understood it, the defendant claimed title from the same source. This, we think, was sufficient to require the defendant, or its agent or attorney, to deny on oath that it claimed title through such source, or that it claimed title through some other source, in order to compel the plaintiff to deduce title from any other than such common source. No such denial was made on oath by or on behalf of the defendant, and we think, therefore, it was sufficient *prima facie* for him to trace his title to such common source.

The principal contention on the part of the defendant, however, seems to be that the Johnston heirs, at the time the village of Rankin was laid out and platted, intended to dedicate, and in fact dedicated, the premises in question to the railroad company of which the defendant is the successor, to become a part of its right of way, to be used for railroad purposes. It seems to be conceded that the strip of land in question was not "marked or noted on the plat as donated or granted" to the railroad company; and it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company under the provisions of section 3 of chapter 109 of the Revised Statutes. But it is insisted that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts and conduct of the parties, tends to show a common law dedication of the land to the company. The evidence bearing upon the question of a common law dedication is conflicting, some of the witnesses, especially some of the Johnston heirs themselves, testifying positively that there was no intention on the part of the heirs to make such dedication; but, as the question is presented here, we need consider only the evidence introduced on the part of the defendant to show such dedication. The county surveyor who made the survey and plat was examined as a witness, and

his testimony, so far as it relates to the strip taken from the land belonging to the Johnson heirs, being the premises in controversy in this suit, is as follows: "I was county surveyor at the time the village of Rankin was platted and laid out. I made the survey and plat. I recollect the circumstances of there being a strip of land left north of blocks 13 and 14 in that plat. There was a strip one hundred feet wide left along each side of the center of the road, as it was then running. In making that plat, I made a plat of the whole town. That strip was left at the time, as I understood it, for the railroad company. I think some of the Johnston heirs were assisting in making the plat. I think William O. Johnston carried chain for me. The strip has been used for railroad grounds ever since, so far as I know. I have been back there since that time, every year or two at different times. Mr. Rankin was overseeing and looking after the platting of the ground. He employed me, and paid me for doing the whole work. He was with me during the platting. I suppose he was acting for the Johnston heirs, in the platting of the ground. He was there all the time, and the Johnston heirs, or some of them, were there all the time, while I was acting. They told me to leave a hundred feet on each side of the track; that they were willing to give almost any amount of land to the railroad to get the station there. And I did so, and that was made and signed by the different parties, and recorded. Why, certainly, it was left for railroad ground, and that was the purpose of it. I do not remember any particular conversation with the Johnston heirs, it being twenty-two years ago. They were all mighty anxious to get the town there, and they were fighting the town a mile distant. There was a great rivalry at that station, and the station a mile or a mile and a half west of it, for the town. They were each fighting to get the station. There was great rivalry. I do not know what inducements they had offered, but they were willing to give almost anything to the railroad to locate the station there. They were willing to give this ground, and anything else." Again on cross-examination, he said: "I don't know that anything was said by the owners as to what use the land was to be put to. I know that it was not left for the owners to use themselves. I know it was called railroad ground. I understood by that that it was for the exclusive use of the railroad."

The evidence shows that shortly after the plat was recorded the railroad company entered into possession of the strip of land in controversy, and built a side track and also erected stock pens upon it, and that it and its successors have continued to occupy and use it from that time up to the commencement of

this suit, — a period of between 19 and 20 years, — claiming it as railroad property. It also appears that from the time the plat was recorded the Johnston heirs made no claim to this strip of land, until a short time before the commencement of this suit, when, for a nominal consideration, they quitclaimed their interest to the plaintiff. Upon this evidence the defendant's counsel asked the court to give to the jury various instructions upon the hypothesis of a common-law dedication, but the court refused to give any instruction of that character, as asked, but modified them so as to limit their scope to a dedication by plat; thereby, in effect, refusing to instruct the jury that the defendant was capable of acquiring lands by a common-law dedication. Thus, the following instruction, being asked, was modified by inserting therein the words in italics, and given thus modified: "The court instructs the jury that a railroad corporation is a public corporation, and is an ever-existing grantee, capable of taking lands by conveyance or by dedication *by plat* by the owner for railroad purposes." The following instruction also was asked on behalf of the defendant: "The court instructs the jury that the word 'dedication,' used in these instructions means an appropriation or devotion or setting apart by the former owners of the land in question for railroad purposes. A dedication of land may be made by deed or writing, or it may be by acts or parol declarations of the owners, or both, without writing; and no particular form is required to establish its validity, it being purely a question of intention. A dedication may also be made by survey and plat alone, without any declaration, either oral or on the plat, when it was evident from the face of the plat that it was intended to set apart certain ground for the use of the public or for the use of a railroad company." This instruction the court refused to give as asked, but modified it as follows, and gave it to the jury so modified: "The court instructs the jury that the word 'dedication,' used in these instructions, means an appropriation or devotion or setting apart by the former owners of the land in question for railroad purposes by a plat. A dedication may be made by survey and plat alone, without any declaration, either oral or on the plat, when it is noted on the face of the plat that it was intended to set apart certain grounds for the use of the public, or for the use of a certain corporation." Other instructions involving a similar principle were modified in a similar manner. The rule which the trial court thus intended to lay down, manifestly, was that while a railroad company may take lands by dedication, where the dedication is by plat executed in the form prescribed by the statute, it is incapable of taking lands by dedication in

any other way, and especially that it cannot become the beneficiary of a common-law dedication. That there was evidence tending to show a common-law dedication to the railroad company, if such dedication is legally possible, cannot be doubted; and the question presented is whether the court decided correctly in holding that no such dedication can be effectual, as vesting a railroad company with the title or right of possession of the land attempted to be so dedicated to its use. It is doubtless true that any person who is the owner of land may, by virtue of his absolute dominion over it, donate or dedicate it to whomsoever he pleases. He may give it to the public, to a body corporate capable of holding it, or to a natural person, for such purposes, either public or private, as the donor sees fit to appoint. But to render such gift effectual the owner must grant or convey to the donee the land, or such interest therein as he wishes to donate, either by deed, or by some equivalent mode of conveyance known to the law. Except in what are known as "common-law dedications," parol gifts of land or of easements therein are ineffectual; it being elementary law that the title to the lands cannot be transmitted *inter vivos* except by deed or its equivalent, and that easements or other incorporeal hereditaments cannot be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised. The provisions of chapter 109 of the Revised Statutes, entitled, "Plats," furnish no exception to this rule. They merely create a new mode of conveyance. By force of these provisions the owner of land, by platting it, and marking or noting on the plat that portions of the land are donated or granted to the public, to a corporation, to a religious society, or to a natural person, in legal effect, conveys the portion of the land so marked or noted to the designated donee or grantee, for the uses and purposes therein indicated. By this statute the purposes for which an owner of land may dedicate or grant it away to others are not enlarged, restricted, or modified, but a new mode is provided, by which his intention to grant or convey his land may be carried into effect. But, by the rules applicable to what is known as "common-law dedications," lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, by acts in pais, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done the right or easement becomes instantly vested in the public. But a dedication of this character, to be effectual,

must be to the public. Washb. Easem. 295. At the common law they are confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots, and lots for school purposes, and pious and charitable uses generally, and in many cases where the use was either expressly, or from the necessity of the case, limited to a small portion of the public. 5 Am. & Eng. Enc. Law, 416, and authorities cited in notes. But we are referred to no decision, and we think none can be found, where a dedication of this character, made for any other purpose than one strictly public, has been sustained. Railroad companies, though engaged in the public employment of common carriers, are essentially private corporations; and, while the lands composing their rights of way are acquired for a public purpose, the ownership of such lands, when acquired, is private. In no proper sense can such corporations be regarded as constituting the public or a portion of the public to which common-law dedications of land can be made. Donations or gifts of land can undoubtedly be made to them where the donor sees fit to effectuate his gift by some one of the ordinary modes of conveyance, and the donation can also be made by plat, where the donor sees fit to mark or note on his plat that the land which he wishes to give to such corporation is donated or granted to it. But we find no authority in the law for holding that a railroad corporation may acquire title to or an easement in land by common-law dedication. Neither the researches of counsel nor our own have brought to light a single case sustaining such dedication, and we think none can be found. Counsel seems to argue that because, under the statute, gifts or grants can be made to railroad companies and other corporations by plat, it should be held that common-law dedications may be made in like cases. This by no means follows. As we have already said, the statute makes the plat a mode of conveyance; thus enabling the donor of lands to accomplish by its means what, independently of the statute, he might have done by any other appropriate conveyance. But it in no way enlarges, either expressly or by implication, the class of cases where an easement may be created in favor of the public by common-law dedication. Moreover, the reasoning sought to be employed would prove too much. The statute makes the plat a conveyance, not only to the public and the corporations, but also to natural persons; and the same principles of analogy which would extend the doctrine of common-law dedications to railroad companies would make it apply as well to natural persons, — a result for which,

we think no one will contend. The case of Morgan *v.* Railroad Co., 96 U. S. 716, upon which much reliance seems to be placed, will be found, on examination, to have been a case of dedication or conveyance of certain lands to the railroad company by plat; and the question of a common law dedication, and whether such dedication could be made to a railroad company was not involved. That case, therefore, cannot be regarded as an authority upon the questions presented here. It should also be noticed that the suit was in equity, — a forum where the doctrine of equitable estoppel has full play, and where there is always a strong indisposition to enforce stale claims, although they may not be barred by limitation, — while this suit is in ejectment, where legal titles only are regarded. The case of Smith *v.* Town of Flora, 64 Ill. 93, to which we are referred, involved a question of a dedication of strips of land on each side of the right of way of the railway company to the municipal corporation, and no question of common-law dedication to a railway company was raised or decided. We fail to find in the record any substantial error, and the judgment of the circuit court will accordingly be affirmed. Judgment affirmed.

Boundary — Monuments — Seashore — Quantity.

Oakes *v.* De Lancey, 133 N. Y. 227; 30 N. E. 974.

Appeal from superior court of New York City, general term.

Action by Thomas F. Oakes against Edward F. De Lancey, to recover for a deficiency in the quantity of land sold by defendant to plaintiff. From a judgment of the general term (15 N. Y. Supp. 561), affirming a judgment for defendant at special term (14 N. Y. Supp. 294), plaintiff appeals. Affirmed.

Finch, J. The only question raised by this appeal is over the true construction of the deed given by the defendant. The premises were described as "Vergemere," and bounded on the north and east by the waters of Long Island sound; and the dispute is whether the description of the conveyance includes or excludes the strip of land on the water fronts between high and low water, and which constitutes the shore. The description is thus phrased: "Beginning at a point in the center line of an avenue sixty feet wide, know as 'De Lancey Avenue,' which point bears south, forty-two degrees and forty-seven minutes west, thirty feet from the point of intersection of the division line between the property hereby conveyed and the land conveyed by the late Peter John De Lancey, of Geneva,

New York, to James J. Burnett, with the northeasterly line of said De Lancey avenue; and thence, running along said division line, north, forty-two degrees and forty-seven minutes east, about eight hundred and sixty-five feet, to a point on the shore of Long Island sound; thence, running along said shore and sound as the same bend and turn easterly, and then southerly, to their intersection with the center line of De Lancey avenue aforesaid; and thence running along said center line of said De Lancey avenue, forty-nine degrees and fifty-five minutes west, about twelve hundred and eighty-eight feet, to the point or place of beginning; containing twenty-two acres and fifty-seven hundredths of an acre of land, be the same more or less." It will be observed that the starting-point of this description is fixed with accuracy and care; and the surveys show that the first course, if run in obedience to the distance given, will extend to low-water mark; and that the last course, to obey the same requirement of distance, must start at low-water mark on the easterly water front. The surveys also show that the strip between high and low water must be included in order to correspond with the quantity of land which the deed purports to convey. The courses and distances and the quantity of land carry the description to low-water mark, and can only be satisfied by including the area of the shore. But the appellant, relying upon the rule that fixed monuments control, and distances and quantities must yield to their safer and superior authority, insists that the shore is such a monument, and by the shore is always meant the line of high water when the boundary is the sea. That is undoubtedly true, and would be decisive if the first course ran simply to the shore." But it does not. It goes, not to the shore, but "to a point on the shore." That point may be anywhere upon the strip lying between high and low water, and where it is must be determined, and can only be determined, by the sole direction furnished, which is the distance. That distance fixes the point at the outer or low-water line of the shore, and so, and only so, is the description satisfied. The first course ends at "a point on the shore," and about 865 feet from the fixed starting-point. Having found this "point on the shore," we are required to go "along said shore and sound" easterly, and then southerly. Starting thus on the line of low water, we must follow that line. The words are not only "along the shore," but also "along the sound," and a line starting at low water, and then running away from it on a diagonal to the line of high water, and thence eastwardly on that line, is neither described nor intended. It would fail again when the return course to the starting-point is reached. That calls for about 1,288 feet, and can only be satisfied by

beginning the course at low-water mark. To these indications of the intent must be added the quantity of land stated to be conveyed, which requires the inclusion of the shore, and is seriously defective if that be excluded. The use of the words "more or less," in connection with the quantity, and the use of the word "about," as qualifying the distance, do not alter the conclusion to be drawn. They are words of safety and precaution, and intended to cover some slight or unimportant inaccuracy, and while enabling an adjustment to the imperative demands of fixed monuments, do not weaken or destroy the indications of distance and quantity, when no other guides are furnished. Belknap *v.* Sealey, 14 N. Y. 143. The appellant further insists that the title to the shore is presumably in the State. That, with us, is the common-law rule, but does not exclude the possibility of title in the grantor derived from the sovereign or obtained by prescription. There is no question of title in the case, and we know nothing about it. Certainly we ought not to presume a want of title in the grantor in order to construe a description which implies such title. There is nothing in the case of Storer *v.* Freeman, 6 Mass. 435, upon which the appellant mainly relies, adverse to our conclusion. In that case the description in the first deed ran "to the shore," which was held to be the line of high water. In the second deed the course ended at a heap of stones "at the shore," and ran thence "by the shore." That heap of stones at "William Elwell's corner" was treated as a possible monument which, if found at the line of low water, would carry the description there, and thence, "by the shore," would follow the line of low water. The point on the shore, or at the shore, fixed in that case at low water by a monument in the form of a heap of stones at a corner, is fixed here without a monument, by the sole remaining guides, which are distance and quantity, at a point on the shore at low-water mark. We think the judgment is right, and should be affirmed, with costs. All concur.

Ascertainment of Lost Corners in Location of Boundary Lines.

Miller *v.* Topeka Land Co., 44 Kan. 355; 24 P. 420.

HORTON, C. J. The Topeka Land Company brought its action against F. O. and G. F. Miller, to quiet its title to a strip or tract of land in the N. E. 1-4 of section 2, township 12, range 15, in Shawnee County, described as follows: "Com-

mencing 1,323.08 feet north of southeast corner of said quarter section; thence running west forty chains, or thereabouts, to the west line of said quarter section, at a point 1,325.33 north of the southwest corner of said quarter section; thence south 33 feet; thence east forty chains, or thereabouts, to the east line of said quarter section; thence north 23 feet to place of beginning." Trial had by the court, Hon. Z. T. Hazen acting as judge *pro tem.* The court, after hearing the evidence and arguments of counsel, found the allegations in the plaintiff's petition to be true, and made a general finding in favor of the plaintiff. The court subsequently, upon its general finding, rendered judgment in favor of the plaintiff and against the defendants, forever quieting the title in the plaintiff to the land in controversy as against the defendants, and all persons claiming under or through them, or either of them. The defendants bring the case here. The principal complaint is that the judgment of the trial court is not sustained by sufficient evidence. The record does not show any exception to the evidence given, nor does it show any evidence was excluded. The case made does not state expressly, or by implication, that it contains all of the evidence introduced upon the trial. The certificate of the judge clearly implies that all of the evidence is not embraced in the record. As the judgment follows the petition, the only matter for our consideration is whether the allegations of the petition are sufficient to entitle the land company to the judgment rendered.

The petition alleges, among other things, that on the 2d day of April, 1860, the United States conveyed by its patent, to Lewis C. Wilmarth, "the northeast quarter of the northeast quarter of section two (2), in township twelve (12), of range fifteen (15), in the district of lands subject to sale at Lecompton, Kan., containing thirty-eight acres and twenty-seven hundredths of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor-general;" that on the 1st day of June, 1860, the United States also conveyed by its patent, to Lewis C. Wilmarth, "the south half of the northeast quarter, and the northwest quarter of the northeast quarter of section two (2), in township twelve (12), range fifteen (15), in the district of lands subject to sale at Lecompton, Kan., containing one hundred and eighteen acres and fifty-two hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor-general," which patent is duly recorded in the office of the register of deeds of Shawnee County, at page 289, vol. 13; that according to the official plat of the survey of said

land, returned to the General Land Office of the United States by the surveyor general, the width of the south half of said quarter section was twenty chains on its east and west lines; that the east line of said northeast quarter of said quarter section was 19.07 chains; that the length of the west line of the said northeast quarter of said quarter section was 19.13 chains; that the length of the west line of the said northwest quarter of said quarter section was 19.19 chains; that the real length of the entire east line of the said quarter section is 39.20 chains and not merely the total of the official measurements, which are 39.07 chains; that the actual and real length of the entire west line of the said quarter section is 39.43 chains, and not merely the total of said official measurements, which are 39.19 chains; and that there are no monuments upon the land of the government survey of the line between the north half of said quarter section and the south half thereof; that on the 24th of May, 1880, Lewis C. Wilmarth and wife executed and delivered to the Topeka Land Company a conveyance of a certain portion of said land, described as follows: "The south half of the northeast quarter of section two (2), in township twelve (12), range fifteen (15), in the district lands subject to sale at Lecompton, Kan., as described in government patents issued to the parties of the first part April 2d and June 1st, 1860, and duly recorded in volume 13, pp. 289, 290, Shawnee County records;" that on the same day, the 24th of May, 1880, Lewis C. Wilmarth and wife, executed and delivered to F. O. Miller a conveyance of a certain portion of said land, described as follows: The north half of the northeast quarter of section two (2), in township twelve (12), range fifteen (15), in the district of lands subject to sale at Lecompton, Kan., as described in government patents issued to the parties of the first part April 2d and June 1st, 1860, and duly recorded in volume 13, pp. 289, 290, in Shawnee County records;" that said defendants have not, nor has either of them, any right, title, or interest in or to any of said lands hereinbefore described, save and except under and by virtue of said deed of said Lewis C. Wilmarth and wife; that the plaintiff is the owner and in the actual possession of the strip or tract of land heretofore described as thirty-three feet wide from north to south, and forty chains long from east to west.

Upon the allegations in the petition, the judgment of the district court must be sustained. In the deeds of Wilmarth to the parties to this action, the reference to the government patents made the description and the United States survey a part of the deeds. Tied. Real Prop., § 481, and cases cited; Davidson *v.* Arledge, 88 N. C. 326; Powers *v.* Jackson, 50 Cal. 429; Tar-

penning *v.* Cannon, 28 Kan. 665. According to the government survey the entire length of the east line of the whole quarter section was 39.07 chains, of which the east line of the south half of the quarter section, as measured by the government survey, was 20 chains long, and the north half 19.07 chains. The length by accurate measurement of the entire east line of the quarter section is 39.20 chains, being .13 chains more than the survey as made by the government surveyors. The plaintiff below, under its petition, is entitled to its proportionate share of the .13 of a chain. "Where, on a line of the same survey, between remote corners, the whole length of which line is found to be variant from the length called for, * * * we are not permitted to presume merely that a variance arose from defective survey in any part, but we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the whole line, and distribute such variance between the several subdivisions of such line in proportion to their respective lengths." Moreland *v.* Page, 2 Iowa, 139; McAlpine *v.* Reicheneker, 27 Kan. 257; Newcomb *v.* Lewis, 31 Iowa, 488–490; O'Brien *v.* McGrane, 27 Wis. 446; Jones *v.* Kimble, 19 Wis. 430–432. Again, the petition alleges that the plaintiff is the owner of and in the actual possession of the strip or tract of land in dispute. In the absence of evidence, we must assume that the trial court had evidence before it to justify its finding, and therefore properly rendered judgment accordingly. The judgment of the district court will be affirmed. All the justices concurring.

Description in a Conveyance of a Cotenant's Undivided Interest in a Joint Estate.

Emeric *v.* Alvarado, 90 Cal. 444; 27 P. 356.

McFarland, J. This is an action for the partition of a tract of land called the "San Pablo Ranch," containing 17,938.59 acres. It is situated in what in now Contra Costa County, and was granted by the Mexican government, and afterwards patented by the United States to the successors of Francisco Maria Castro, who died on the 5th day of November, 1831. The action was commenced on November 19, 1867, in the district court of the fifteenth judicial district in and for the city and county of San Francisco, and an interlocutory decree was rendered in that court on July 15, 1878. Several appeals were taken, and the judgment and order denying a new trial were reversed by this court, because the findings as to two or three

issues were deemed defective; and furthermore, and mainly, because the decree determined rights, interests, and shares in the land only as they existed in the hands of the original tenants in common, and did not determine the present rights, interests and shares of all the parties to the suit as they existed at the time the action was commenced. Most of the findings of the district court were approved, and the cause was remanded to the superior court (successor to said district court), with instructions to find on certain issues mentioned; and "upon the findings heretofore made and herein approved, and those hereafter to be made under the directions of this court," to proceed and specify in its interlocutory decree the "rights and interests of all parties to the action," and adjudge partition between them according to such rights and interests. Emeric *v.* Alvarado, 64 Cal. 527; 2 Pac. Rep. 418. It was established by the first decree, and the decision of this court, that the persons denominated "original tenants in common," and the shares belonging to each, were as follows: Martina Castro de Alvarado, fifteen equal twenty-second parts of said rancho; Antonio Castro, Joaquin I. Castro, Juan Jose Castro, Gabriel V. Castro, Victor Castro, and Jesus Maria Castro, each one equal twenty-second part; and Luisa Moraga de Briones, Maria de los Angeles Moraga de Briones, Jose Moraga, Gaudalupe Moraga de Martinez, and Francisca Moraga, each one equal one-fifth of one equal twenty-second part of said rancho. (The seven persons first above named were children of Francisco Maria Castro, and the five persons last named were children of Francisco Castro de Moraga, a deceased daughter of said Francisco Maria Castro.) After the cause went back to the superior court, further findings were had; and that court —Judge James G. Maguire presiding —with great care, and in a systematic method that must have cost great labor and thought, found, determined, and stated the interests and shares, not only of the said original codefendants, but of all persons holding or claiming under them, and being parties to this action; and entered an interlocutory decree adjudging partition among the parties in accordance with the findings. The case now comes here the second time upon numerous appeals from the interlocutory decree, and from an order denying a motion for a new trial. There are several hundred parties to the action. The interests of many of the parties to the appeals are friendly as to some matters and hostile as to others, so that they are appellants as to some points and respondents as to others, thus presenting different and contradictory claims upon the same transcript. The findings of fact of the superior court number 274, many of them having numerous subdivisions, and they

were all necessary to the disposition of the case. These findings, with the conclusions of law, the original findings of the district court, and the last interlocutory decree occupy 752 pages of the printed transcript No. 13,276, while there is much additional matter in the other transcripts. It is apparent therefore, that the labor of the court below must have been very great; and that it would be impossible to give here a full statement of the whole case in detail without exceeding all reasonable limits of an opinion. As, however, the opinion of this court delivered on the former appeal contains quite an extensive history of the case, and as the points arising on the present appeals may be grouped into a few general classes, we think that the case can be disposed of without much detailed statement of facts. There are five separate transcripts, — Nos. 13,276, 13,275, 13,871, 13,984, and 14,006. In the present opinion, rendered in No. 13,276, we will consider and determine all the points made in all the appeals, and judgments will be rendered in the appeals based upon the other transcripts according to the conclusions declared in this opinion. (The reference here made to the transcript refer to transcript 13,276, unless otherwise stated.)

I. Specific Tracts. At various times individual tenants in common, owning large undivided interests in the ranch, undertook by grant, bargain, and sale deeds to convey the whole of particular parts of the ranch described by metes and bounds, or other sufficient descriptions as though the grantor owned in severalty the particular part conveyed. The lands described in these conveyances are called "specific tracts." There are more than a hundred of such tracts, and they are designated in the findings by numbers. The court below found that these specific tracts, conveyed by deeds purporting to convey the whole title, "should be allotted and set apart in partition as a portion of the shares and interest of such cotenants, and in such manner as to make such deeds effectual as conveyances of the whole title to such segregated parcels, if the same can be done without material injury to the rights and interests of other cotenants who did not join in such conveyances, or those claiming under such other cotenants, or any of them; and the tracts so conveyed are to be charged in proportion to their value to the interest in said rancho of the said grantors." This finding is attacked as erroneous by some of the appellants, who contend — *First*, that such a conveyance is void; and *second*, that, if not void, the grantee under it of a specific tract should take, on partition, only such a share as is equal to the undivided interest which the granting cotenant had in such specific tract.

Upon this subject it is declared in section 764 of the Code of Civil Procedure as follows: "Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance purporting to convey the whole title to such specific tract to the purchaser in fee-simple and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance." If this section of the Code controls in the case at bar, then the question under discussion must be answered adversely to the contention of appellants. But the part of the section above quoted was not enacted until 1876; and, as the conveyances here involved were made prior to that time, it is contended by appellants that the said provision of the Code is not applicable to this case. Of course, if this amendment to the section was an entirely new provision, and completely changed the old law upon the subject, it would not be retroactive, and could not destroy or seriously disturb prior vested rights. But, in our opinion, the law was substantially the same before the amendment as after it. From a general statutory enactment not expressing a design to change the law there arises no necessary presumption that the law was different before the enactment. It was said at a very early date in the history of our jurisprudence that "to know what the common law was before the making of a statute, whereby it may be known whether the statute be introductory of a new law or only affirmatory of the common law, is the very lock and key to set open the windows of a statute," and that "in all general matters the law presumes the act did not intend to make any alteration." These rules were approved by our predecessors, the learned Justice Field delivering the opinion of the court, in Baker *v.* Baker, 13 Cal. 95, 96. Statutes are frequently intended to remove all doubt and uncertainty as to some principle of law, and to state, in apt, distinct, and explicit language, what the law is upon a particular subject; and we think that such was the effect of the amendment which we are now considering. In the same amendment it was also enacted, for the first time, that, when a co-tenant had made improvements on a part of the common land, that part should be allotted to him,

on partition, without considering the value of such improvements, if the same could be done without material injury to the other cotenants; but it is not contended that such was not the law before the amendment. In Seale *v.* Soto, 35 Cal. 102 (decided in 1868), the lower court had ordered in its interlocutory decree "that there be set off to the said several parties such portions of said premises as will include their respective improvements, provided, always, that the rights or interests of neither of the other parties be prejudiced thereby;" and this court held, on appeal, that the order was "equitable, just, and proper," and "cannot be successfully assailed."

The decision of this court on the former appeal, if not declaring, as the law of the case, that the rule laid down in section 764 should govern, is at least strong authority to that point. Mr. Justice Thornton, who delivered the leading opinion in the case, when giving reasons for the proposition that an interlocutory decree should determine the rights of all the parties, urges, as an argument, the consideration that otherwise the provisions of section 764 could not be carried out. He quotes the section in full, and says: "We cannot see how these provisions can be carried out by the referees unless the interest of each party is ascertained by the court and stated specifically in the decree. And when the decree for partition is made, as it is in this case, the court must determine under which of the original cotenants each party claims, and state it in the decree, so that the referees can perceive clearly and be enabled to execute the provisions in section 764 when inserted in the decree." None of the other justices dissent from this part of the opinion, although Mr. Justice Ross holds that it was sufficient, in the first instance, to determine the shares and interests of the original cotenants. The concurring opinion of Mr. Justice McKee merely fortifies the opinion of Justice Thornton as to the proper character of the interlocutory decree, and says, among other things, as follows: "The next step in order is to ascertain and determine the respective rights and interest of each of the tenants in common in the mode prescribed by sections 763, 765, and 769 of the Code of Civil Procedure, and adjudge partition between them according to their respective rights." Moreover, in the findings of the district court, which were then under the review of this court, there was a finding on the subject of specific tracts to the precise effect, and in the identical language, of the finding of the superior court which we are now considering, and the superior court was directed to "proceed upon the findings heretofore made and herein approved." Therefore, whether or not the

decision can be taken as a direct adjudication of this point, it is evident that, in the judgment of the court at that time, the true rule on the subject is that declared in section 764. And we are satisfied, upon principle and authority, that such is the correct rule.

It is clear that a deed made by one cotenant conveying a specific part of the land of the cotenancy is not void. That was definitely settled in Stark *v.* Barrett, 15 Cal. 362. In that case one of the cotenants (Vaca) had undertaken to convey all his right, title, and interest in and to a tract containing 1,500 acres, being a part of the common land; and it was argued, and authorities cited to the point, that the conveyance was void because it destroyed the unity of possession, because it impaired the right of the other cotenants to partition, and imposed additional burdens on them when seeking partition, etc. But the court, after reviewing the authorities, held definitely that such a conveyance was not void, although, as against the other cotenants, the grantee might lose his rights on partition. And, of course, where, as in the case at bar, a cotenant undertakes to convey the whole title to a specific tract, his conveyance, under well-settled principles, operates as an alienation of, at least, all the right and interest which the grantor had in the specific tract; so that he comes within the rule that his conveyance is not void, as established in Stark *v.* Barrett, Freem. Co-Tenancy, § 204 *et seq.* Furthermore, when a cotenant undertakes by a bargain and sale deed to grant a specific tract in severalty, although his deed will not convey the interest of his cotenants, he is estopped under well-settled rules from denying, as against his grantee, that he owned a less interest than his deed purports to convey. And, under equally well-settled rules, if he afterwards acquires the title of his cotenants in the specific tract, such title will inure to the benefit of his grantee; and if, upon partition, such specific tract be allotted to him, then it happens that he does acquire his cotenants' title, and it passes to his grantee. But a suit in partition under our Code is, in its nature and essence, equitable (Emeric *v.* Alvarado, 64 Cal. 619; 2 Pac. Rep. 418; Gates *v.* Salmon, 35 Cal. 593), and the court in its decree proceeding to do what is "equitable, just and proper" will not only allot to a cotenant that part of the common land upon which he has valuable improvements, but will also set apart a specific tract to the share of a copartner who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have that which is justly his, when such disposition of the land can be made "without material injury to the rights and interests of the other cotenants." See 1 Story Eq. Jur.

§ 656c; Freem. Co-Tenancy, §§ 202–205; McKee *v.* Barley, 11 Grat. 340; Campau *v.* Godfrey, 18 Mich. 27; Holcomb *v.* Coryell, 11 N. J. Eq. 548; Nichols *v.* Smith, 22 Pick. 319.

There are no decisions in this State which assert a different rule. Gates *v.* Salmon (reported in 35 and also in 46 Cal.) is cited on both sides. In the case as reported in 35 Cal., the only point decided is that, in a suit for partition, grantees of specific tracts are necessary parties to the action; and the views expressed in the opinion on the general subject are in harmony with the conclusion above stated. In the case as reported in 46 Cal., it is stated that the grantees of specific tracts, under certain deeds, acquired the interests which their grantors had at the time of the execution of the deeds; but the character of such deeds does not appear, nor in the confused state of the pleadings and issues and parties in that case, does it appear against whom the statement is intended to apply, or between what parties the question was raised. Of course, one tenant in common cannot, as against his cotenants, absolutely convey away the interests of the latter in any part of the common land. In Pfeiffer *v.* Regents, 74 Cal. 156; 15 Pac. Rep. 622, a tenant in common had undertaken to grant to a stranger the right to perpetually divert water from the common land upon the several land of the grantee; and in support of that grant the respondent had cited Stark *v.* Barrett, and Gates *v.* Salmon, and other cases in which the rule applicable to conveyances of specific tracts was discussed, and had sought to invoke that doctrine in behalf of the asserted water-right. And it was in that connection that the court said that the former decisions on the subject should not be pushed further; that is, that they should not be so extended as to embrace the asserted right of one tenant in common to create an easement on the common land. The case, however, recognizes the rule as hereinbefore stated. (It may be remarked, as was said in that case, that it appears, from many cases in the California Reports, to have been a common custom among the owners of large Mexican grants in California for individual cotenants to convey specific parcels of the common land. The custom probably grew out of the fact that during the long periods of time necessary to complete titles, to obtain patents, and to make partitions there could be but little beneficial use of the land unless it were segregated into parcels by the cotenants and their grantees.) Our conclusion on this point is that the court below was right in holding that specific tracts embraced in deeds purporting to convey the whole title should be allotted in severalty to the grantees therein, and charged, respectively, to the shares and interests of

the granting cotenants, where it could be done without material injury to the rights of the cotenants not joining in such deeds, in manner as set forth in the findings and decree.

2. There were also quitclaim deeds of interest in specific tracts; and with respect to them the court found as follows: "And it further appearing that various of said cotenants sold fractional undivided interests in specific tracts out of the common land of said rancho, and executed to the purchasers deeds of conveyance purporting to convey interests in such specific tracts to the purchasers in fee, the interests described in such deeds should be allotted and set apart in partition to such purchasers, or their grantees, respectively, in such manner as to make such deeds effectual as conveyances of such interests, if the same can be done without material injury to the rights and interests of other cotenants who did not join in such conveyances, or those claiming under such other cotenants, or any of them; and the interests so conveyed, and hereinafter designated as fractional interests of specific tracts, are to be charged in proportion to their value to the interests in said rancho of the same grantors." We see no error in this finding. The grantee in such a deed cannot expect, or legally claim more than the deed purports to convey, which is merely the share of the grantor in the tract. The contention of some of the appellants that such a deed should be filled by an allotment of the whole tract in severalty cannot be maintained, and where there is a covenant of warranty in such a deed it attaches merely to the interest which the deed purports to convey. Kimball *v.* Semple, 25 Cal. 441; Gee *v.* Moore, 14 Cal. 472; Morrison *v.* Wilson, 30 Cal. 344; San Francisco *v.* Lawton, 18 Cal. 365; Barrett *v.* Birge, 50 Cal. 655; Brannock *v.* Monroe, 65 Cal. 491; 4 Pac. Rep. 488.

(The remainder of the decision is omitted, it not being considered necessary for illustration of the particular principle, for which the case is reported.)

Adjoining Tract Previously Conveyed Referred to in a Subsequent Conveyance as a Monument.

Probett *v.* Jenkinson, 105 Mich. 475; 63 N. W. 648.

McGrath, C. J. This is a bill to quiet title to a gore-shaped parcel of land, which was included in what is known as the "Steam-Mill Reserve" on Black river, in the city of Port Huron. The reserve fronted on the river, and the land adjoining on the north, east, and west was platted prior to 1837. In 1866

Skinner & Ames, the then owners of the reserve, subscribed and recorded the plat. In that plat the parcel lying south of River street and west of Bridge street was distinguished as "Lot C." In 1876, Skinner & Ames subdivided lot C. according to the following plat: (Plat omitted.)

This plat was not acknowledged or recorded. In the same year they mortgaged lots 1, 2, 3, and 4, to one Fish, and later in that year gave a mortgage to Martha C. T. Williams, of Detroit, upon the remainder of said lots. The description in the Williams mortgage is as follows: "Lots 5, 6, 7, 8, 9, 10, 11, and 12 in the Skinner & Ames plat of a part of the Black River Steam-Mill reserve, being all that part of said reserve south of River street and west of Seventh street bridge, except lots 1, 2, 3, and 4, shaded green in the map hereto annexed. As stated in the mortgage, there was attached to it a map, which was a copy of the original plat in the possession of Skinner & Ames, in so far as the lots south of River street and west of Seventh street bridge were concerned, except that it did not have the letter C upon it, nor did it have all of the dimensions and monuments that were upon the original plat. Lot 10 is shown on this map as being 50 feet on River street, and very much wider upon Black river, but the figures indicating its width on the river are not given as they are on the original plat, where they are stated at 90 feet. This map was a tracing made on the same scale as the original plat, and when the mortgage came to be recorded the map was detached from the mortgage, and attached to the record in the register's office, where it has since remained.

In February, 1878, complainant purchased from Skinner & Ames lots 11 and 12. Subsequently Mrs. Williams' mortgage was foreclosed in chancery, and on the 28th of January all of the lots described in the mortgage were bid off to Mrs. Martha C. T. Williams. On the 27th day of July, 1880, Mrs. Williams conveyed the two lots to the complainant, describing them as follows: "Lots 11 and 12 of the Skinner & Ames plat of the subdivision of a part of the Black River Steam-Mill reserve, in said city of Port Huron, south of River street and west of Seventh street bridge, being lots now occupied by said Probett, and on which he has located limekilns, and were conveyed to him by Thomas S. Skinner and wife and Wallace Ames and wife." The next year, in May, 1881, the complainant, desiring more land, through Mr. B. C. Farrand, an attorney at Port Huron, applied to Mr. Elisha Taylor, representing Mrs. Martha Williams, to know what Mrs. Williams would take for lot 10, or for the west half of that lot, and received a reply that she would take $1,000 for the whole lot, or $600 for the west half

of it. The complainant accepted the proposition for one-half of the lot at $600. And on the 10th day of May, 1881, Mr. Elisha Taylor drew up the deed, and it was executed by Mrs. Williams, and sent through Mr. Farrand, to the complainant. When this deed was drawn, Mr. Taylor supposed the lot was 50 feet wide both on the river and on River street, whereas, as a matter of fact, it was 50 feet wide on River street, and had a frontage on Black river of 90 feet. The description in this deed is as follows: "A parcel of land twenty-five feet wide in front on the south side of River street, and of the same width extending southerly to the channel bank of Black river, and known as the westerly part of lot 10 of the Skinner & Ames plat, south of River street and west of Seventh street." The complainant purchased the west half of lot 10 in May, and in June following, John Jenkinson, the husband of the defendant, through Mr. Elisha Taylor, contracted with Mrs. Williams for the purchase of lots 5, 6, 7, 8, 9, and the easterly half of lot 10, according to said Skinner & Ames plat of said Steam-Mill reserve. The date of this contract is fixed by John Jenkinson, on page 113 of the record, as in June, 1881. There was nothing upon the ground to designate where the division line between the east half of lot 10 and the west half of such lot should be located when complainant purchased, or when Mr. John Jenkinson contracted for the east half, nor was there at the time when the defendant afterwards obtained her deed from Mrs. Williams; but the premises were what might be termed open, or in common, so far as anything indicating the division line between complainant's and defendant's premises. On the 23d day of July, 1884, at the request of John Jenkinson, the husband of the defendant, Mrs. C. T. Williams, through Mr. Elisha Taylor, executed and delivered to the defendant a deed of the lands embraced in the contract, describing them in such deed as follows: "All that part of the Black River Steam-Mill reserve situated and lying between River street and the Black river, and bounded on the westerly side by lands owned by Stephen T. Probett, and bounded on the easterly side by River street, lots numbered 1, 2, 3, and 4 of Skinner & Ames plat, and mortgaged by Skinner and Ames to Arthur Fish, and south by the channel bank of Black river — intending hereby to convey lots numbered 5, 6, 7, 8, 9, and the easterly half of lot 10, according to the Skinner & Ames plat of that part of said reserve, without guarantying the correctness of said plat, though it is supposed to be correct, subject to all taxes and assessments in the year of 1881 and subsequently, which the now party of the second part assumes, and is to pay and cancel, if

not already paid." The record was recorded on July 31, 1884. On the 24th day of July, 1884, John Jenkinson and his wife, the defendant, Eliza Jane Jenkinson, made a mortgage to the Michigan Mutual Life Insurance Company upon the east half of lot 10, and other lands, describing said land in said mortgage as follows: "Lots 5, 6, 7, 8, 9, and the east half of lot 10, of that part of Black River Steam-Mill reserve lying between Black river and River street, bounded on the west by land owned and occupied by Stephen T. Probett, on the west by the lands mortgaged by Skinner & Ames to Arthur Fish, August 26th, 1876; said lots being numbered according to Skinner & Ames plat of a part of Black River Steam-Mill reserve." The application to the insurance company was made by Mr. Jenkinson and his wife, through Mr. Farrand, for the purpose of taking up the contract and obtaining the deed. This deed and mortgage were executed three years after the execution of the deed by Mrs. Williams to the complainant of the west half of the lot, and likewise three years after the contract made by her to the husband of the defendant, of the east half of said lot. At the time that the complainant purchased the west half of lot 10, he had not seen the plat, or a copy of the plat, referred to as the "Skinner & Ames Plat," and did not till 1885, when he went to Mr. Skinner, and was shown the plat. And, at the time that Mr. Taylor drew the deed to complainant for the west half of lot 10, Taylor had no knowledge in regard to the width of the lot on the river. In 1885 John Jenkinson asserted to complainant that the latter only had 125 feet, and complainant then examined his deed, and also saw Mr. Skinner, and obtained from him the original plat, and took the same to Detroit, and showed it, together with his deed, to Mr. Taylor; and Mr. Taylor, in order to correct the mistake which had been made, on the 14th day of December, 1885, drew up and executed a quitclaim deed from Mrs. Martha C. T. Williams to the complainant of the west half of lot 10, which deed was recorded December 16, 1885.

It is clear from this record that, when complainant purchased the portion of lot 10, both he and Taylor supposed that said lot was of the same width from front to rear; that both supposed that the conveyance made included all of the west half of lot 10; and that, when the conveyance was made to Jenkinson, Taylor then supposed that the west half of lot 10 had hitherto been conveyed to Probett, and that the conveyance then being made included all of the remainder of said lot 10. The question, however, hinges, not upon the intention of the parties respecting the land intended to be conveyed by the deed to complainant, but rather upon the construction to be given to the description

in the deed from Martha C. T. Williams to defendant. The case is, we think, ruled by Plummer *v.* Gould, 92 Mich. 1; 52 N. W. 146. The intention of the grantor is clearly expressed in the conveyance to defendant. Defendant contends that she went upon the land, and that a line corresponding to the line as given in the conveyance to complainant was pointed out to her by Probett as the east line of his land, but this is denied. She had examined a plat which, although it did not give distances on the south line, clearly indicated that the lots were wider on the river, and she accepted the deed which clearly expressed the grantor's intention. The decree is affirmed, with costs to complainant. The other justices concurred.

A Specific Description will Control General Description — Reference to Other Deed or Map.

Prentice *v.* N. Pac. Ry. Co., 154 U. S. 163.

In error to the circuit court of the United States for the district of Minnesota.

This was an action in ejectment by Frederick Prentice against the Northern Pacific Railroad Company, the St. Paul & Duluth Railroad Company, and Owen Fargusson. On trial without a jury the circuit court rendered judgment for defendants. Plaintiff brought error.

This action of ejectment was brought September 7, 1883, to recover an undivided half of certain lands in the city of Duluth, county of St. Louis, Minn. Pursuant to a written stipulation of the parties, the case was tried without a jury, and upon the question of title alone, and resulted — Mr. Justice Miller and Judge Nelson concurring — in a judgment for the defendants. 43 Fed. 270.

The case made by the special finding of facts is substantially as follows: —

The sixth section of article 2 of the treaty of the 30th day of September, A. D. 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, ratified (pursuant to a resolution of the United States Senate passed on the 10th day of January, 1855) by the President on the 29th day of January, 1855, whereby those Indians ceded to the United States certain territory lying adjacent to the headwaters of Lake Superior, contained the following provisions, viz.: "And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that Chief Buffalo may select one section of land at such place in the ceded

territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct." 10 Stat. 1110.

Under the provision of the treaty, and on the day of its date, Chief Buffalo, by an instrument of writing executed by him, and filed in the office of the United States commissioner of Indian affairs at Washington, selected the land to be conveyed by the United States, and appointed the persons to whom it was to be conveyed, indicating the selection and appointment as follows: "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota Territory, immediately above and adjoining Minnesota point; and I direct that patents be issued for the same, according to the above recited provision, to Shaw-bwaw-skung, or Benjamin G. Armstrong, my adopted son, to Matthew May-dway-gwon, my nephew; to Joseph May-dway-gwon and Antoine May-dway-gwon, his sons, — one quarter section to each."

Matthew, Joseph, and Antoine, under date of September 17, 1855, executed and delivered to Armstrong an instrument assigning to him their right, title, and interest under the appointment and selection of Chief Buffalo. That assignment, after referring to the treaty, and the above instrument of selection and appointment, provided:—

"In consideration of the premises, and of one dollar to us in hand paid by the said Benjamin G. Armstrong, the receipt whereof is hereby acknowledged, we do hereby sell, assign and transfer, jointly and severally, all our right, title, interest, equity, claim and property in and to the said land, and all our right and equity in and to the said instrument so made by the said Buffalo, jointly and severally, and our, and each of our, right and equity to have patents issued to us, according to the above-cited directions of the said Buffalo; and we hereby direct, jointly and severally, that patents issue to said Benjamin G. Armstrong accordingly."

This instrument of assignment was executed by Matthew, Joseph, and Antoine in the presence of, and before, the United States agent and the United States interpreter.

Armstrong and wife, September 11, 1856, made, executed, and delivered to the plaintiff herein a deed of conveyance, the cited consideration being $8,000. The land so conveyed is thus described in the deed: "One undivided half of all the following described piece or parcel of land, situate in the county of St. Louis and territory of Minnesota, and known and described as follows, to wit: Beginning at a large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota point, com-

mencing at said rock, and running east one mile, north one mile, west one mile, south one mile, to the place of beginning, and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30th, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents, together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof," etc. The deed, sealed and delivered in the presence of a justice of the peace of Wisconsin, was acknowledged by the grantors on the day of its execution before that officer, whose official character was certified by the clerk of the circuit court of the county where the acknowledgment was made. It was not certified to have been acknowledged in accordance with the laws of Wisconsin. The deed was duly recorded in the county of St. Louis, territory of Minnesota, on the 4th day of November, A. D. 1856.

Armstrong and wife, on the 27th day of August, 1872, executed and delivered to the plaintiff a confirmatory deed, which was duly recorded in the county of St. Louis, State of Minnesota, September 2, 1872. The deed was in these words: —

"Whereas, on the eleventh day of September, in the year one thousand eight hundred and fifty-six, we, Benjamin G. Armstrong and Charlotte Armstrong, wife of aforesaid Benjamin G. Armstrong, conveyed by a quit-claim deed to Frederick Prentice, of Toledo, Ohio, the undivided one-half part of all our interest in certain lands situated at or near the head of St. Louis bay, and intended to describe our interest in what is known as the 'Chief Buffalo Tract,' at the head of St. Louis bay, Minnesota Territory, and then believing that the description in said deed would cover or was the tract that would be patented to us by the United States of America, according to said Buffalo's wishes, and a contract we held from the heirs of said Buffalo, but, to definitely fix upon the lands designed to be conveyed, it was stated in said deed to be the land set off to the Indian chief Buffalo at the Indian treaty of September thirtieth, in the year one thousand eight hundred and fifty-four; and, further, I, the said Armstrong, gave a contract on the tenth day of September, in the year one thousand eight hundred and fifty-six, to the said Frederick Prentice, binding ourselves and heirs to give said Frederick Prentice any further writing or instrument he might require.

"And on the first day of July, in the year one thousand eight hundred and fifty-seven, I, Benjamin G. Armstrong, and Charlotte Armstrong, agreed to and did sell to Frederick Prentice

the other one-half of said Buffalo tract, for which said Frederick Prentice paid us something over two thousand ($2,000) dollars, and since that time has paid us to our full satisfaction for the whole property; and we agree to, and do by these presents, confess payment in full for the whole of the above tract, in compliance of the first deed for the one undivided half, and the carrying out of the contract to sell the balance July first, in the year one thousand eight hundred and fifty-seven. This is intended to cover the land deeded by us to the said Prentice in the deed given on the eleventh day of September, one thousand eight hundred and fifty-six, and recorded in Liber A of Deeds, page 106, at Duluth, State of Minnesota, and the land included in the contract of the first of July, eighteen hundred and fifty-seven, and intended to cover the lands as described in patents from the United States of America to Benjamin G. Armstrong, Matthew May-dway-gwon, Joseph May-dway-gwon, and Antoine May-dway-gwon, and described as follows: To Benjamin G. Armstrong, the west half of the southwest quarter and the lot number five (5) of section twenty-seven, and lot No. three (3) of section thirty-four, containing together (182.62) one hundred and eighty-two and sixty-two one-hundredths acres; and to Joseph May-dway-gwon the southeast quarter of section twenty-eight, containing one hundred and sixty acres; and Antoine May-dway-gwon, the east half of the northeast quarter of section twenty-eight, and the west half of the northwest quarter of section twenty-seven, containing one hundred and sixty acres.

"And to Matthew May-dway-gwon the southwest quarter of section twenty-two, containing one hundred and sixty acres, all of the above being in township fifty north, of range fourteen west, of the fourth principal meridian, State of Minnesota; and the three last named pieces of land have since been deeded by the said Matthew, Joseph, and Antoine May-dway-gwon to Charlotte Armstrong, but previous to the date of said deeds the above-named Joseph, Matthew, and Antoine May-dway-gwon had assigned or transferred all their right, title, and interest therein to the said Benjamin Armstrong. I, the aforesaid Benjamin G. Armstrong, did sell by deed and contract to Frederick Prentice, which I, the said Charlotte Armstrong, knew at the time, but did not know but that, by getting another deed or conveyance after the patents were issued, we could sell the property, but am not satisfied that we had sold and assigned all our right, title, and interest to Frederick Prentice previous to our deeding to any other person or persons, and that we had no right to deed or convey to any other person or persons, as the

title to the lands above described was then, virtually and by right, vested in the said Frederick Prentice, and that the first deed for the one-half and the contract for the remaining half of said land, with the payment thereon made at the time by the said Frederick Prentice, bound us to give him good and sufficient deeds to said property whenever so demanded; and we do hereby assign and quitclaim all our right, title, and interest now or at any time held by us to all the above-described property in fulfillment of our agreement with the said Frederick Prentice."

The tract of land which Chief Buffalo had designated as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections, and part of it was found to be occupied and claimed by certain Indian traders under the treaty. After a lengthy correspondence and investigation in the department of the interior, the relatives of Buffalo, entitled to the land reserved for them, conceded the validity of the claims of these Indian traders, and, in lieu of the lands thus held by them, received other lands adjacent to that selected by Buffalo to make up the quantity of 640 acres, but not in the form of a parallelogram, though maintaining a continuous connection.

A report of the secretary of the interior to the president, under date of September 21, 1858, and made part of the findings, contained, among other things, the following: —

"Now, therefore, under all the circumstances of the case, it having been fully proved that these relatives of the Chief Buffalo acquiesce in the selection made for them by agent Gilbert, and desire that patents should issue to them for this land, and the commissioner of Indian affairs having recommended such approval, I have respectfully to request that you will approve the same, in order that patents may issue in accordance with their request as follows, viz.: To Matthew May-dway-gwon, S. W. $\frac{1}{4}$ Sec. 22, T. 50 N., R. 14 W., 160 acres to Antoine-May-dway-gwon, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Sec. 28 and W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Sec. 27, T. 50 N., R. 14 W., 160 acres; to Joseph May-dway-gwon, S. E. $\frac{1}{4}$ Sec. 28, T. 50 N., R. 14 W., 160 acres; to Shaw-bwaw-skung, or Benjamin G. Armstrong, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Sec. 27, lot No. 3, Sec. 34, lot No. 5, Sec. 27, 182.62."

The patent to Armstrong, issued October 23, 1858, contained the following recitals and description of the land embraced by it: —

"Whereas it appears from a return dated the twenty-seventh day of September, one thousand eight hundred and fifty-eight, from the office of Indian affairs to the general land office, that there has been selected and approved for 'Shaw-bwaw-skung,

or Benjamin G. Armstrong,' as one of the 'connections' of said Chief Buffalo, the west half of the southwest quarter and lot number five, both of section twenty-seven, and lot number three of section thirty-four, containing together one hundred and eighty-two acres and sixty-two hundredths of an acre, all in township 50 north, of range 14 west of the fourth principal meridian, in the State of Minnesota. Now, know ye," etc.

The parties, at the trial, entered into the following stipulation: —

"It is admitted for the purposes of the trial of the above-entitled action: That the land in dispute, described in complaint of plaintiff herein, is part of the land described and included in the patent of the United States to Benjamin G. Armstrong, dated October 23, 1858, and recorded in Book B, at page 500, in the office of the register of deeds of St. Louis County, Minnesota. That the defendants are in possession of the specific portions of said land described in their respective answers herein. And, as respects the Northern Pacific Railroad Company, it is in possession of the certain portions of said land colored blue upon the map hereto attached, and that all the defendants assert title to said respective portions, derived from a certain deed made and executed by Benjamin G. Armstrong and wife to John M. Gilman, dated August 31, 1864, and recorded in the office of the register of deeds of St. Louis County, Minnesota, September 12, 1864, in Book C of Deeds, at page 665, and from a certain other deed made and executed by Benjamin G. Armstrong and wife to Daniel S. Cash and James H. Kelly, bearing date October 22, 1859, and filed for record in the office of the register of deeds in and for said St. Louis County, January 5, 1860, and thereafter recorded in Book C of Deeds, at page 206. That the said defendants have succeeded to whatever title or right said Kelly and Cash and said Gilman obtained by virtue of said deeds, respectively, in and to the premises in dispute. That at the commencement of this suit said defendants withheld said premises, and the rents, issues, and profits of the same, from said plaintiff, although they had theretofore been requested to admit him to the possession of an undivided half ($\frac{1}{2}$) of said premises, and the rents and profits thereof. That the undivided half ($\frac{1}{2}$) of the portion of the premises described in said complaint, claimed by each of said defendants, is worth fifty thousand dollars ($50,000) and upwards." The court found the facts in accordance with this stipulation.

The United States government surveys of the lands ceded by the treaty of September 30, 1854, to the United States, had not

been made at the date of the deed from Armstrong to plaintiff, and were not made until the year following that date.

Gilman took the above conveyance without actual notice of the deed from Armstrong to the plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him.

The defendants herein claim title to the pieces or parcels of land in controversy as grantees of Gilman, and under and through the deed to Gilman of August 31, 1864.

The large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota point, described in the deed from Armstrong to Prentice, is the beginning of the boundary of the tract conveyed, is well identified, and was generally known to the few people familiar with the place, and was recognizable at the time of the trial below; and a mile square, measured from that point, as called for in the deed, would wholly depart from the shore of St. Louis bay, and would cover about one-half or three-fifths land, and the remainder the water of Lake Superior.

The land selected by Buffalo Chief lay upon the shore of St. Louis bay, immediately adjoining Minnesota point; and this selection was followed, as near as it could be, by the patents of the United States issued to satisfy that reservation, considering the elimination from the mile square of the lands held by the traders, and the vagueness of Buffalo's description, and the necessity of conforming the final grant to the surveys of the United States.

If the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts his title, were exactly reversed, the description in that deed would include a large part of the land actually selected by Buffalo Chief, and also included in the patents from the United States, but it would not include the lands sued for in this action.

The instrument executed by the Chief Buffalo, dated September 30, 1854, was the only selection or appointment ever made by him under the sixth clause of the second article of the said treaty.

Chief Buffalo died in the month of October, 1855.

At the date of the deed to Prentice, of September 11, 1856, Armstrong did not have any interest in land in St. Louis County, Minnesota Territory, except what he was entitled to under the Buffalo selection and appointment above referred to, and under the above assignment from the other.

The conclusions of law found by the circuit court were: —

That the appointment of persons to whom the United States

were to convey the section of land reserved by the above provision of said treaty made by Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under that provision, and, upon the ratification of the treaty, vested in Armstrong and the other appointees named such an interest as the treaty gave to the land so reserved;

That the patent of the United States to Armstrong, and his acceptance of it, was a valid execution of the treaty on that subject;

That the deed from Armstrong to plaintiff, of September 11, 1856, was, in its execution, acknowledgment, and recording, a valid and sufficient deed, and its record constructive notice of its contents;

That the description of the deed of Armstrong to plaintiff, of September 11, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the tract described therein, and the said deed is ineffectual as a conveyance to plaintiff of any interest or title, except such as Armstrong had in or to the land therein described, and the plaintiff took no title under it to the land for the possession of which this action is brought.

That the quitclaim deed from Armstrong to Gilman, of August 31, 1864, conveyed to the latter such interest, and no more, as Armstrong had in the land therein described at the date of said deed; and

That the plaintiff is not entitled to recover in this action, and judgment must go in favor of the defendants, for their costs and disbursements.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The court below correctly interpreted the decision in Prentice *v.* Stearns, 113 U. S. 435, 5 Sup. Ct. 547, as holding that the deed from Armstrong to Prentice, under which alone the latter can assert a title to the land in controversy, was an instrument designed to convey a defined tract or parcel of land, not any possible interest existing in Armstrong under the treaty with the Chippewas, the selection of Buffalo, and the appointment that the lands selected by him should be conveyed to Armstrong and other named relatives.

This question was reargued in the court below, in the present case, in the light of additional facts supposed to have been adduced.

Mr. Justice Miller, in his opinion in this case, said: "We remain of the opinion we were on the former trial. The first

descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly defined; and, if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was, and there is no occasion to resort to any inference that he meant any other land than that. It is now found as a fact that this boundary would include a surface for one-half to three-fourths of which is land and the remainder is water of Lake Superior." 43 Fed. 270.

The specific description by metes and bounds of the land conveyed by the Armstrong deed to Prentice, namely, "one undivided half of all the following described piece or parcel of land, situate in the county of St. Louis and territory of Minnesota, and known and described as follows: Beginning at a large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota point, commencing at said rock, and running east one mile, north one mile, west one mile, south one mile, to the place of beginning," — does not, it is conceded, embrace the land in dispute. Indeed, the plaintiff insists, on several grounds, that that description should be rejected altogether, as inaccurate and mistaken; and he is driven to rest his claim of title to the lands in dispute upon the clause of the deed immediately following the words above quoted, namely, "and being the land set off to the Indian chief Buffalo, at the Indian treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to Armstrong, and is now recorded with the government documents."

But the plaintiff, although compelled to rely upon the words last quoted, insists that they mean what, in our opinion, is not justified by a fair interpretation of them. It seems entirely clear that the words in the clause beginning "and being the land," etc., were intended to describe generally what had been before specifically described by metes and bounds; that "and being" is equivalent to "which is," in which case this clause of general description — the specific description by metes and bounds, being rejected as not embracing the land — cannot, it is conceded, be regarded as an independent description of the subject of the conveyance.

It is said that the deed should not be construed as intended to convey merely a specific tract, and thereby make it inoperative, because, at the time it was executed, Armstrong did not have any interest in a specific tract that he could convey, but only a general right, under the Buffalo document, to have land located and patented to him by the United States. Referring to the argument made by counsel in support of this view, Mr. Justice Miller said: "They say that the reference to the land set off to the Indian chief Buffalo at the treaty of 1854 meant, not any definite piece of land, but any land which might come to Buffalo or his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey such after-acquired interests which were patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it. Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock which we now as a matter of fact, find to have an existence, and can be well identified, he had bought a mile square, according to the points of the compass, the southwest corner of which commenced at that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. And so with regard to the other description. Buffalo had made his selection, had described the land which he designed to go by that treaty, not to him, but to his relatives, whose names are given; and it was an undivided half of this land thus selected by the Buffalo chief, and not other land, or different land which might come to Armstrong, that he conveyed, and intended to convey, to Prentice."

After distinguishing this case from Doe *v.* Wilson, 23 How. 457, and Crews *v.* Burcham, 1 Black, 352, Mr. Justice Miller proceeded: "But, in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it, to a certain extent. It was a thing which could be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was

talking about some vague and uncertain right — uncertain, at least, as to locality, and as to its relation to the surveys of the United States — which he was intending to convey to Prentice, instead of the definite land which he described, or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive clauses, neither of which had that idea in it, one of which is rejected absolutely by the plaintiff's counsel as wholly a mistake, and the other is too vague in its language to convey even what plaintiff claimed for it. We are not able, therefore, to hold, with counsel for plaintiff, that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative that the deed was intended to convey any land that might ultimately come to Armstrong under the treaty, and under the selection, and under the assignment to Buffalo." 43 Fed. 276.

We are entirely satisfied with these views. It results that neither the description by metes and bounds, nor the general description of the lands conveyed by the deed under which the plaintiff claims, is sufficient to cover the lands here in dispute.

Another matter deserves notice. It is found as a fact that if the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts title, were exactly reversed, the description in the deed would include a large part of the land actually selected by Buffalo chief, and also included in the patents from the United States. But this fact is immaterial, for it is found that if the course were reversed, as suggested, it would not include the particular land here in controversy.

The case, then, is this: Looking into the deed under which the plaintiff claims title, for the purpose of ascertaining the intention of the parties, we find there a specific description, by metes and bounds, of the lands conveyed, followed by a general description which must be held to have been introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands so conveyed. As neither description is sufficient to cover the lands in suit, there can be no recovery by the plaintiff in this action of ejectment, whatever may be the defect, if any, in the title of the defendants. If this were a suit in equity to compel a reformation of the deed upon the ground that, by mistake of the parties, it did not properly describe the lands intended to be conveyed, and if such a suit were not barred by time, a different question would be presented upon the merits.

What has been said renders it unnecessary to consider whether the deed from Armstrong and wife to Prentice was so acknowledged and certified as to entitle it, under the laws of Minnesota, to record in that State, and, by such record, become legal notice of its contents to Gilman, and those claiming under him.

We perceive no error in the record, to the prejudice of the plaintiff in error, and the judgment is affirmed.

Habendum Clause, When it Controls the Premises.

Doren *v.* Gillum, 136 Ind. 134; 35 N. E. 1101.

DAILEY, J. This was an action begun in the Jay circuit court by the appellant, Emory E. Doren, to enjoin the sale of certain real estate by the appellee Stephen A. D. Gillum, sheriff of Jay County, on an execution issued on a judgment obtained by the appellee Adelma Lupton against Robert E. Rees, Charles Lord, and William H. Hubbard. Such proceedings were had that a restraining order was granted pending litigation. Briefly stated, the amended complaint described the real estate, and alleged the appellant to be the owner in fee-simple, and in the actual and full possession, of the same. Also, that on the 3d day of February, 1891, the appellee Lupton ordered an execution issued on a judgment in his favor for $416, obtained in the Jay circuit court on the 9th day of January, 1885, which execution was issued and directed to the sheriff of Jay County, Ind., who under said execution, levied upon the real estate described, and threatened and was about to advertise for sale, and sell, the same on execution, and would do so, unless restrained by the order of the court; that William H. Hubbard was not, before the rendition of said judgment, nor at the time, nor has he since become, the owner of said real estate; that, if the sale of said tract be made, it will harass and annoy the appellant by litigation growing out of such sale, and will work irreparable loss and injury to him; that such a sale would cast a cloud upon his title, and would affect the value of his property in a manner not susceptible of measurement or redress in an action at law; and he prays that the sale be enjoined. To this complaint, each of the appellees filed separate demurrers, which were submitted to the court, and overruled, and exceptions duly reserved thereto, whereupon the appellee Gillum answered by general denial, and the appellee Lupton in two paragraphs, the first of which was a general denial. The second paragraph alleges the judgment against said Rees, Lord, and Hubbard, the issuing of the execution thereon, and that said Hubbard was then, and still is, the owner of the real estate de-

scribed, having acquired title thereto by deed executed on the 25th day of September, 1882, which deed is in the words and figures following, to wit: "This indenture witnesseth that William H. Rush and Eliza J. Rush, of Jay County, in the State of Indiana, convey and warrant to Levi Hubbard and Margaret Hubbard, of Jay County, in the State of Indiana, for the sum of one thousand dollars, the following real estate in Jay County, in the State of Indiana, to wit: The southwest quarter of the southwest quarter of section twenty-six (26), township twenty-three (23) north, of range twelve (12) east, containing forty (40) acres, more or less; to have and to hold the same during their natural lives, and each of their natural lives, and then descend to William H. Hubbard, and the heirs of his body. In witness whereof, the said William H. Rush and Eliza J. Rush, his wife, have hereunto set their hands and seals this 25th day of September, 1882. William H. Rush. Eliza J. Rush." (Here follows an allegation of acknowledgment and recordation.) The answer further avers that on the 24th day of May, 1890, and after the death of the grantee Margaret Hubbard, the appellant, procured a quitclaim deed from Levi Hubbard, without having paid any consideration therefor, and with full knowledge of the title thereto of William H. Hubbard, and of the judgment of said Lupton; that the appellant purchased the land at a sale for taxes, and holds a deed therefor from the auditor of Jay County, but that said deed is illegal and void, and conveys no title, because said land was sold without having first offered the life estate then thereon, and without having first made proper effort to collect any taxes then due out of the personal property then owned by the said Levi Hubbard, and without having properly advertised or listed said land, and because the same was sold for more than was due on said tract, and for other irregularities and illegal acts mentioned in the appraising, listing, advertising, and selling of said premises. The appellant, Doren, moved the court to require the several causes of defense therein separated into paragraphs and numbered, which motion was overruled, and an exception taken.

The first error assigned by appellant, upon which he seeks a reversal of this case, is in the overruling of this motion, and in support of it he urges duplicity in the pleading. No question is presented under this assignment of error, as no bill of exceptions signed by the judge appears in the record. The appellant then filed a demurrer to this second paragraph of answer for want of sufficient facts, which was overruled by the court, and exception taken. Thereupon appellant filed a reply and the cause, being at issue, was submitted to the court for trial. The court

found for the appellees, entered a decree dissolving the restraining order theretofore entered, and rendered judgment against appellant for costs. Appellant moved for a new trial, on four reasons assigned, which motion was overruled by the court, and excepted to at the time. Thereupon appellant prayed an appeal to this court, which was granted.

The second assignment of error, that "the court erred in overruling plaintiff's demurrer to the second paragraph of the separate answer of the defendant Adelma Lupton," raises the principal question for consideration in this case, because it involves the construction of the deed from Rush and wife to Levi and Margaret Hubbard. It is urged by the appellant that "by the premises of this deed, 'convey and warrant,' title in fee simple is passed as effectually as by a grant at common law," and that "the habendum totally contradicts, and is repugnant to, the estate granted in the premises," and hence "that the premises govern, and the habendum is void." In 5 Amer. & Eng. Enc. Law, pp. 456, 457, it is said: "The term 'premises' is given to all that part of the deed which precedes the habendum clause. The habendum and tenendum clause is that which follows the words 'to have and to hold.' Originally, — that is, under the feudal system, — this clause defined the quantity of interest or estate which the grantee is to have in the property granted, and the tenure upon or under which it was to be held. Since the practical abolition of the various feudal tenures, the only object of the clause is to state the character of the grantee's estate. But, although the words of limitation usually appear in the habendum as an independent clause of the deed, it is not necessary that they should, if they appear in some other part, as in the premises. So unimportant is the habendum that, if it is hopelessly repugnant to the limitations appearing in the premises, it will be ineffectual to control the terms of the premises. But if, by fair construction, the premises and habendum may be reconciled so that both may stand, effect will be given to both." It is claimed by the appellant that the word "descend," in the deed, is clearly a word of limitation, and not of purchase, and, taken either in its common or technical sense, implies an estate of inheritance to be taken by William H. Hubbard as heir, and that, "if the first takers take only a life estate, then there was nothing to descend to William H. Hubbard as "heir;" leaving the implication that a fee was given Levi and Margaret Hubbard, and that no remainder was intended to vest in William H. Hubbard; or, briefly stated, it is insisted that, "the word 'descend' having been used, no remainder was created." An investigation of the authorities

does not enable us to agree with the appellant in his contention. It has been held that where, in a conveyance, the word "descent" was used, it meant the same as "go to." 2 Shars. & B. Lead. Cas. Real Prop., p. 273; Halstead *v.* Hall, 60 Ind. 209; Tate *v.* Townsend, 61 Miss. 316; Jones *v.* Crawley, 68 Ga. 175; Moore *v.* Weaver, 16 Gray, 305; Borgner *v.* Brown, 133 Ind. 398; 33 N. E. 92. The premises do not always control the construction. Words importing a greater estate than one for life in the first taker may, by force of the contest, be so limited as to give the first taker a life estate only, with a remainder over. Reeder *v.* Spearman, 6 Rich. Eq. 89; Gillam *v.* Caldwell, 11 Rich. Eq. 73. The estate may be limited in the habendum, although not mentioned in the premises of a deed, and without the use of the word "remainder." Wager *v.* Wager, 1 Serg. & R. 374; Wommack *v.* Whitmore, 58 Mo. 448. And the latter part of a deed has been allowed to control, and render what seemed to be a fee a life estate in the first taker. Prior *v.* Quackenbush, 29 Ind. 475. The argument that, if a remainder was created, it was a contingent one, does not find support in the authorities. Davidson *v.* Koehler, 76 Ind., on page 409. All parts of a deed should be given due force and effect. "The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent part of the deed. Such explanations are usually found in the habendum." Carson *v.* McCaslin, 60 Ind. 334; Edwards *v.* Beall, 75 Ind. 401. Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered, or arbitrarily thrust aside. Mining Co. *v.* Beckleheimer, 102 Ind. 76; 1 N. E. 202. Nor do we think the case of Taney *v.* Fahnley, 126 Ind. 88; 25 N. E. 882, lends appellant any support, in his theory of a fee in Levi and Margaret Hubbard. In that case there are no words whatever indicating a life estate, and the descent referred to is to a class, as heirs, and providing that the grantor shall be included in the class, as such, while in the case under consideration the clause in the deed granting the premises to Levi Hubbard and Margaret Hubbard "to have and to hold the same during their natural lives and each of their natural lives," defines an estate for life to Levi and Margaret Hubbard; and the expression, "then to descend to William H. Hubbard, and the heirs of his body," clearly refer to the time when said William shall come into the possession of the estate, and the remainder vested in him, and become subject to levy and sale at the date of the execution of the deed by William H. and Eliza J. Rush. The deed creates a remainder interest in William H.

Hubbard by purchase, and the use of the word "descend" will not be allowed to defeat or destroy the clear and well-expressed meaning of the deed.

The third cause assigned in appellant's motion for a new trial, that "the decision is contrary to law," involves the same questions already considered, regarding the construction of the deed, and we will not repeat what we have heretofore said concerning it.

The fourth specification in appellant's motion is that the court erred in excluding the following evidence offered by the plaintiff: (1) The record of the quitclaim deed from Levi Hubbard to the plaintiff, conveying the real estate in question, and sought to be sold in execution; (2) the record of a tax deed by the auditor of Jay County, conveying said premises to the plaintiff; (3) the receipts for taxes paid thereon by the plaintiff subsequent to the sale for taxes; and (4) the value of the improvements made upon said tract by plaintiff since the execution of the tax deed by the auditor. It is the duty of the life tenant to pay, and keep down, the general taxes assessed against the real estate of which he is in possession, and enjoys the rents and profits; and if, through failure to perform his duty, the estate in remainder is sold, destroyed, or wasted, he is required to make the loss good. If, through the failure of the tenant to pay the taxes, the estate is sold and conveyed to another, beyond the power of the remainder-man to recover it, it is, as to him, destroyed and wasted, and the inheritance is gone, and the tenant should pay for the loss. Clark *v.* Middlesworth, 82 Ind. 240. In 1 Shars. & B. Lead. Cas. Real Prop., p. 209, it is said: "The tenant for life must also pay the ordinary taxes upon the land held by him; and if he neglect or refuse to pay the taxes, and suffer the land to be sold, and buy it in, he will not be allowed to set up the tax against the remainderman or reversioner, for that would be taking advantage of his own wrong. Patrick *v.* Sherwood, 4 Blatchf. 112. In Ohio, a life tenant suffering a sale of his land for taxes forfeits his life estate, and will not be allowed to redeem the land;" citing McMillan *v.* Robbins, 5 Ohio, 28. But these questions were not involved in the issues. The whole question, in this case, turns upon the construction of the deed from William H. Rush and wife to Margaret and Levi Hubbard, with remainder to William H. Hubbard, heretofore given; and as the latter took, by virtue of that conveyance, a vested interest in the land, it became and is subject to the lien of the appellee Lupton's judgment, and was properly levied upon by the sheriff. There is no available error in the record, and the judgment of the court below is affirmed.

Reservation from Operation of a Deed of Conveyance.

Gould *v.* Howe, 131 Ill. 490; 23 N. E. 602.

Appeal from circuit court, Marshall County.

Ejectment by Edward L. Gould against Charles Howe for an alley in the city of Wenona. In 1855 the Illinois Central Railroad Company platted the town (now city) of Wenona, and the land in suit was described in said plat as an alley. The plat was acknowledged by the president of the railroad company, May 16, 1855, before a notary public. Afterwards the company conveyed to Thomas A. Hill land in which this alley was included. The deed reserved "streets and alleys according to recorded plat of the town of Wenona." The defendant's title was derived from Hill. The plaintiff claimed title through a quitclaim deed from the railroad company made after the deed to Hill. The alley has since been vacated. Defendant obtained judgment. Plaintiff appeals.

Scholfield, J. Two questions only are presented for our decision by the argument made upon this record: (1) Does the plat of the Illinois Central Railroad Company vest the fee of the streets and alleys marked thereon in the corporation of Wenona? (2) Do the words, "reserving streets and alleys according to recorded plat of the town of Wenona," in the deed of the Illinois Central Railroad Company to Hill, prevent the transfer of the fee in such streets and alleys, subject to the easement of the public therein by that deed?

1. Bearing in mind that acknowledgments of instruments affecting title to, or interest in, realty were unknown to the common law and are purely of statutory origin, it will be obvious that whether, in a given case, an acknowledgment is effective depends entirely upon whether it is taken and certified in the manner and by the person within the contemplation of the statute. The statute in force when this plat was made was the Revision of 1845. By that revision one mode is provided for taking acknowledgments of town plats, and another and different mode is provided for taking acknowledgments of deeds and other instruments for the conveyance of real estate. The former are to be acknowledged before "a justice of the supreme court, justice of a circuit court, or a justice of the peace, while the latter are to be acknowledged before "any judge, justice, or clerk of any court of record in this State having a seal, any mayor of a city, notary public, or commissioner authorized to take the acknowledgment of deeds, having seal, or a justice of the peace." See section 16, c. 24, and

section 20, c. 25, Rev. St. 1845; 1 Purple St. 1856, pp. 156, 176; Gross St. 1868, pp. 103, 118, §§ 16, 20. It may be that there is nothing in the character of the instruments which would preclude a uniform system of acknowledgment for all; and we may concede that it would therefore have been competent for the general assembly to have so provided, either by assigning that duty to courts, to persons exercising *quasi*-judicial powers, or to persons arbitrarily selected and named for that purpose, without reference to any official position; but it would have been equally competent to have dispensed with acknowledgments altogether, and, in the matter of town plats, to have provided that the simple causing of the plat to be made and recorded should *ipso facto* vest the fee of the streets and alleys in the municipality, without reference to any acknowledgment whatever. But these are all legislative questions, with which we have nothing to do; it being our province solely to inquire, what has the general assembly enacted in this respect? not, why has it enacted it? In the enactments referred to *supra*, the general assembly did not assume to vest the power to take acknowledgments in persons exercising the same classes or grades of powers; for there is no more dissimilarity between the powers exercised by any officers under our government than between those exercised by the judges, mayors, notaries, clerks, commissioners, and others who are empowered to take acknowledgments of deeds. The enumerated officers are empowered to take acknowledgments of deeds, not because the act of taking acknowledgments is germane to any particular power inhering in the offices they hold, but simply and only because the general assembly has, in the exercise of plenary legislative authority in that respect, arbitrarily designated them for that purpose, just as it has since designated masters in chancery, and might have designated aldermen and constables. The language of the statute in relation to the acknowledgment of plats, to which we have referred, is first found in an act approved January 4, 1825 (Compilation 1830, p. 184), and it remained unchanged until the revision of 1874. The language of the statute in relation to the acknowledgment of deeds and other conveyances of real estate has, however, often been changed so that different acknowledgments have been properly taken from time to time, before persons who had no authority to take acknowledgments at prior times. Thus, by the act in relation to conveyances, approved January 31, 1827 (Rev. Laws 1827, p. 98, § 9), deeds and other conveyances of real estate were required to be acknowledged before "one of the judges of the supreme or circuit court of this State, or before one of the clerks of the circuit court,

* * * or before one of the justices of the peace of the county;" and it was not until two years after that statute was in force that the legislature enacted, by an amendment approved January 22, 1829 (Laws 1829, p. 24, § 1), that notaries public, mayors, and certain other designated officers should, in addition to those enumerated therein, be empowered to take acknowledgments. No one will pretend that the acknowledgment of a deed before a notary public or a mayor, taken before the 22d of January, 1829, could have had any validity; and this, for the plainly obvious reason that no power to take acknowledgments was conferred upon a class of officers to which they belonged, nor upon them by specific designation; and precisely the same is to be said of the acknowledgment of this plat before a notary public. The power confessed by the statute in relation to conveyances does not extend beyond the class of instruments which are the subject of that statute; and the statute in relation to town plats neither expressly nor by necessary implication includes notaries public. By the Revision of 1874, the general assembly has provided that town plats are to be "acknowledged in the same manner that deeds of land are required to be acknowledged;" but this is palpably a radical amendment and change of the prior law, and it has no retroactive effect. It necessarily follows that, in our opinion, the acknowledgment of the plat before the notary was a nullity, and the plat, therefore, did not operate to vest the fee of the streets and alleys in the municipality. See, also, Gosselin *v.* Chicago, 103 Ill. 623; Thomas *v.* Eckard, 88 Ill. 593.

2. While the plat was not a conveyance of the fee, it was evidence tending to prove a common-law dedication, which we have held vests an easement in the streets and alleys in the municipality. Railroad Co. *v.* Hartley, 67 Ill. 439; Maywood Co. *v.* Village of Maywood, 118 Ill. 61; 6 N. E. Rep. 866. It is often difficult to distinguish between an exception and a reservation in a deed, and the words "reserving" or "excepting" are not conclusive in determining which is intended. The character and effect of the provision itself, in which such words occur, must determine what is intended. It is sufficient, for the present, to say that an exception in a deed withholds from its operation some part or parcel of the thing which, but for the exception, would pass, by the general description, to the grantee, A reservation in a deed, on the other hand, is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right in behalf of the grantor, and not of a stranger. Co. Litt. 47*a;* 1 Shep. Touch. 77, 80; 2 Washb. Real Prop. (2d Ed.), pp. 646, 693, § 67;

Tied. Real Property, § 843. If here there had been no public easement in the streets and alleys, and the company had desired to retain for its servants and employees a private way across the land conveyed, it would have been a reservation; it would have been the creation of a new right, issuing out of the thing granted, in behalf of the grantor. But the streets and alleys were already in existence. The municipality had an easement in them for the public. The land occupied by them was included by the terms of the deed in the general description of the property conveyed, and hence, but for the provision withholding them from its operation, they would have been included in the grant. Beach *v.* Miller, 51 Ill. 207. The language of the deed could only be held to withhold the fee of the streets and alleys from its operation upon the hypothesis that, "according to recorded plat of town of Wenona," the fee of the streets and alleys is vested in the municipality, for that is the measure of what is withheld from the operation of the deed; and therefore, since "according to recorded plat of town of Wenona" an easement only in the soil of the streets and alleys is vested in the municipality for the use of the public, that only is withheld from the operation of the deed. Nothing, therefore, was retained in the railroad company which could subsequently pass by its quitclaim; and when the alley was vacated the easement was terminated, and there was nothing to revert to the railroad company. The judgment is affirmed.

Covenant of Seisin Against Incumbrances When Broken.

Copeland *v.* McAdory, 100 Ala. 553; 13 So. 545.

Stone, C. J. The action was commenced against the appellant and his wife to recover damages for alleged breaches of the covenants in a deed of bargain and sale executed by them conveying to the appellees a certain lot or parcel of land in the city of Birmingham. There was judgment for the wife on her plea of coverture. The trial was had on an amended complaint having three counts. The first of these alleges a breach of the covenant against incumbrances. The second complains of an alleged breach of the covenant that the grantors had good right to convey. The third alleges a breach of the general covenant to warrant and defend. The defect or insufficiency of the title of the grantors, alleged in each count, is that a part of the premises conveyed, particularly described, formed a part of a public street or avenue of the city of Birmingham, having been, prior to the execution of the con-

veyance, dedicated to the public for such use by the former owner, the Elyton Land Company, when mapping and laying out the city; and that the mayor and aldermen of the city had entered, taking possession thereof, and dispossessing the appellees. Demurrers to each count were interposed, assigning causes which are not very clearly expressed. As we interpret them, the defect or insufficiency in each count charged to exist is that the right and title of the mayor and aldermen is not described with sufficient certainty or particularity, and that it is not shown the appellees were ousted or dispossessed by legal process. The demurrers were overruled, and the order overruling them in the matter of the first assignment of error. In considering the sufficiency of the complaint, we are confined to the causes of demurrer assigned. Though either count may be in any respect insufficient, if not subject to the objections stated, the demurrer was properly overruled. Code, § 2690. The second count is founded on an alleged breach of the covenant of good right to convey the equivalent of a covenant of seisin. In declaring for a breach of the covenant, all that is necessary is to negative the words of the covenant generally. No description of or reference to the outstanding or permanent title is necessary; nor is it necessary to aver an eviction or ouster. The covenant is broken, if at all, as soon as it is made, and not by the occurrence of any future event. The grantor is presumed to know the estate of which he was seised; the fact is peculiarly within his knowledge, and he must plead and prove it. Rawle Cov. (3d Ed.) 53; Rickert *v.* Snyder, 9 Wend. 421; Anderson *v.* Knox, 20 Ala. 156. Whether the existence of a highway over a part of the premises conveyed is a breach of this covenant is not a question raised by the demurrer, and, of consequence, is not now before us. There is a marked distinction in pleading a breach of the covenant of seisin, or of good right to convey and of other covenants. It is not sufficient, in declaring for a breach of the other covenants, to negative merely the words of the covenant. The paramount title or incumbrance, the existence of which is supposed to constitute a breach, must be stated. But it is not necessary nor advisable to enter into any particular description of such incumbrance or title. The statement of it substantially is all that is requisite. Rawle Cov. 125 *et seq.* In the notes to 2 Greenl. Ev., §§ 242–244, the form of a count for a breach of the covenant against incumbrances, of quiet enjoyment, and of general warranty will be found. In each count there is no more than the averment that there was at the time of making the deed an outstanding lawful right and title, and in whom it resided. In

each of the counts of the complaint in which it was necessary to state the existence of an incumbrance or of a paramount title, that which is relied on as constituting the breach of the covenant is clearly stated; its nature, character, and origin; and in this respect the demurrer was not well taken.

The covenant of freedom from incumbrances, like the covenants of seisin and of good and lawful right to convey, is a covenant *in praesenti*. It is broken as soon as made if there is an outstanding older and better title, or an incumbrance diminishing the value or enjoyment of the land. Anderson *v.* Knox, 20 Ala. 156; Andrews *v.* McCoy, 8 Ala. 920; Clark *v.* Swift, 3 Metc. (Mass.) 390. An eviction or dispossession of the grantee is not a constituent element of the breach. It is the defect of title or the burden of an incumbrance existing when the conveyance is made which works the breach. It is said by Greenleaf: "The covenant of freedom from incumbrance is proved to have been broken by any evidence showing that a third person had a right to or an interest in the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. Therefore a public highway over the land, a claim of dower, a private right of way, a lien by judgment or by mortgage made by the grantor to the grantee, or any mortgage unless it is one which the covenantee is bound to pay, or any other outstanding older and better title, is a breach of this covenant." 2 Greenl. Ev., § 247. The authorities generally recognize an outstanding easement of any kind as falling within the covenant, operating its breach. Rawle Cov. 113 *et seq.*; Tied. Real Prop., § 850; Huyck *v.* Andrews, 113 N. Y. 81; 20 N. E. Rep. 581. The definition of an incumbrance expressed by Parsons, C. J., in the early case of Prescott *v.* Trueman, 4 Mass. 630, is that it is "every right to or interest in the land granted to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance," has frequently been cited and approved. An easement conferring upon its owner an interest in the land, the right to some profit, benefit, dominion, or lawful use out of or over the land, though it may be consistent with the passing of the fee by the conveyance, is a burden upon the estate granted, diminishing the full measure of its enjoyment. There is some conflict in the authorities whether the existence of a public highway over the land is an incumbrance, and a breach of this covenant. In the case of Kellogg *v.* Ingersoll, 2 Mass. 101, an action for a breach of the covenant, the breach assigned was the existence "of a public town road or way, duly laid out by the town of A. for the use of all its inhabitants," and it was held the breach

was well assigned; that the existence of the road was an incumbrance. Parsons, C. J., said: "It is a legal obstruction to the purchaser to exercise that dominion over the land to which the owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of the damage is a proper subject for the consideration of the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid." Though the doctrine of this case has been denied in New York, Pennsylvania, and Wisconsin, it has been adopted in all the New England States, and in Indiana, Illinois, Iowa, and Missouri. Tied. Real Prop., § 853, and notes. In Kellog *v.* Malin, 50 Mo. 496, it is said: "All the authorities concur in holding that an easement constitutes an incumbrance. If a person acquires the fee to land free and unincumbered, he obtains the exclusive and absolute dominion over it, and may use, enjoy, and appropriate it to any purpose he may see fit; but if it is subject to an easement or incumbrance it is not free, nor can he enjoy it to the fullest extent. If a public highway or a railroad track run over it, he cannot have its undisturbed enjoyment, for it is used by others in defiance of his will." The vendor of lands frames the covenants of the conveyance into which he enters. He may extend or limit them at pleasure, or he may decline to introduce into the conveyance any covenants whatever, limiting the grant to such estate or interest only as he may have in the land, and leaving the purchaser to take it with all the defects of title, and subject to all the incumbrances which affect or bind the estate. But if he enters into covenants he must respond for all damages resulting, if the covenants are in legal contemplation and in fact untrue. The existence of a public highway is a burden — an incumbrance — diminishing the enjoyment of the land, subjecting it to the dominion and use of the public. If it were a private right of way, all authorities declare that it would be an incumbrance and a breach of the covenant. That it is public does not change the fact that there is an outstanding right to the use and to dominion over the land, which may continue forever, interrupting its quiet enjoyment. The covenant of quiet enjoyment and of warranty are practically identical in operation, and whatever constitutes the breach of the one covenant is a breach of the other. Either extends to all lawful outstanding adverse claims upon the premises conveyed. An easement materially affecting the value, interfering with the use and possession, of a part of the premises, is a breach of the covenant. Scriver *v.* Smith, 100 N. Y. 471;

3 N. E. Rep. 675. A right of way, public or private, incumbering a part of the premises, is a breach of the covenant. Russ *v.* Steele, 40 Vt. 310; Lamb *v.* Danforth, 59 Me. 322; Butt *v.* Riffe, 78 Ky. 352. An eviction, actual or constructive, of the whole or a part of the premises, is an essential constituent of the breach. But it is not intended that there should be an eviction by legal process. If there is an hostile assertion of an irresistible, paramount title, the grantee may yield to it, not awaiting suit and judgment. If he yields, it is at his peril, and he takes upon himself, in an action for a breach of the covenant, the burden of proving the title really paramount. Tied. Real. Prop., § 855. Assuming the truth of the averments in the complaint, as must be done on demurrer, the paramount right and title to the part of the premises conveyed which formed a part of the street or avenue — the paramount right to use and dominion over them — resides in the mayor and aldermen, and they had the right to enter and take possession. It was not only the right but the duty, of the appellees to surrender the possession. They were under no duty to the appellant to maintain a wrongful possession, subjecting themselves to be treated as trespassers. McGary *v.* Hastings, 39 Cal. 360. The result of the views we have expressed is that the demurrer to the several counts of the complaint for the causes assigned were properly overruled.

The demurrer to the two special pleas filed by the appellant do not appear in the record. When such demurrers are sustained, the presumption on error is that causes of demurrer were specified, and covered whatever of objection or insufficiency may be found in the pleas. The first plea purports to be a plea of recoupment, and the matter of recoupment is expenses incurred by the appellant in the employment of counsel to procure the correction of the misdescription in a deed executed by the appellees conveying to the appellant a lot in exchange or as the consideration for the lot conveyed by him to the appellees. It would scarcely be insisted that in a separate, independent action such a claim or demand is recoverable; and it is now sufficient to say that a claim or demand not recoverable in a separate independent action cannot be made the matter of a plea of recoupment. 3 Sedg. Dam., § 1061. The second plea avers that at the time of the execution of the conveyance the appellees had full knowledge of the claim of the mayor and alderman of the city of Birmingham, and are therefore estopped from a recovery; but knowledge or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for pro-

tection and indemnity against known and unknown incumbrances or defects of title. Tied. Real Prop., § 853; Rawle Cov. 128 *et seq.*; Dunn *v.* White, 1 Ala. 645. The measure of damages for a total breach of the covenants of seisin or of good right to convey or of quiet enjoyment or general warranty is the purchase money, or value of the consideration. If the failure of the title is partial, the measure of damages is the value of the parcel lost, measured by the consideration, or the value at the time of the eviction. Kingsbury *v.* Milner, 69 Ala. 596; Bibb *v.* Freeman, 59 Ala. 612; 2 Suth. Dam. 288; Mecklem *v.* Blake, 99 Amer. Dec. 78, note; Brooks *v.* Black (Miss.), 8 South. Rep. 332; 24 Amer. St. Rep. 267, note. When, as in this case, there is not a failure of title, the fee remaining in the grantee, but a part of the land is subject to a perpetual easement, which may not be removed by the payment of money, the measure of damage is the depreciation in value of the land by reason of the incumbrance. 3 Sedg. Dam., § 972; Clark *v.* Ziegler, 78 Ala. 362, 85 Ala. 154; 4 South. Rep. 669. Consequential damages are not recoverable. Nor is the value of improvements the grantee may have made after the purchase an element of damage. If compensation is made for them, as has been properly said, it must be made by the evictor. Mecklem *v.* Blake, 99 Amer. Dec. 73, note. There was error in the refusal of the first, second, third, and fifth charges requested by the appellant. There was no error in the refusal of the fourth and sixth charges requested. The appellees were under no duty to give notice to the appellant before surrendering possession to the mayor and aldermen, if their right and title was paramount. Having surrendered without suit, as has already been said, in this action, the burden proving the superiority of the title to which they yielded rests upon the appellees. They are not bound to prove it conclusively, as is asserted in the sixth instruction. In all civil cases the measure of proof is that which produces in the minds of the jury a reasonable conviction. The other matters assigned as error will not arise again, and a consideration of them is unnecessary. Reversed and remanded.

Breach of the Covenant of Warranty.

Eversole *v.* Early, 80 Iowa, 601; 44 N. W. 897.

GIVEN, J. 1. Plaintiff asks to recover upon the ground that the fee-simple title of Barke and his grantees was paramount to the title which he had received from Early, to protect himself and his grantee against which he was compelled to purchase said

paramount title, to his damage, which he asks to recover under defendant's covenants of warranty to him. If the third count states as facts that which shows that the Barke title was not paramount to the tax-title of Early, then it states facts constituting a defense. According to said count, Barke's title was not complete. It depended upon his paying the $968.50 within a certain time, a failure to do which would defeat his title, and render the tax-title paramount. The demurrer should have been overruled. It is contended that this ruling is without prejudice, as, under the issues joined by the other counts, plaintiff had to prove that the title bought in by him was paramount. This is true, but defendants pleaded facts that would show upon what the question of superiority of title rested. Without this count, there was nothing in the pleading to even suggest the real point in controversy.

2. The point in controversy was as to which of these titles was paramount at the commencement of this action. If the Barke title was paramount, we have no doubt as to plaintiff's right to protect himself by purchasing it. The old rule, that there was no eviction until actual ouster, does not prevail. It is sufficient that the holder of the paramount title is able to assert it successfully. Thomas *v.* Stickle, 32 Iowa, 71; Funk *v.* Cresswell, 5 Iowa, 62.

There is no conflict in the evidence, and the only fact appearing therefrom, in addition to that shown by the pleadings, is that, the case of Barke *v.* Early et al. being appealed, a stipulation was entered into by which the time for payment of the $968.50, and for filing a petition for improvements, was extended to a later date than that named in the decree, being a date later than that on which Barke conveyed to Mason and Thompson, and they to the plaintiff. The decree in Barke *v.* Early et al. explicitly provides that, in case plaintiff fails to pay the $968.50, "the title to said land shall be quieted in defendants." During the time allowed for the payment, it could not be said that either title was paramount as that depended upon the payment or failure to pay. It was during this time that Barke conveyed to Mason and Thompson, and they to the plaintiff. Hence it is not true that the plaintiff purchased a paramount title.

Appellee contends that, as the patent title could have been perfected and enforced at the time plaintiff purchased it, it was the paramount title. In Thomas *v.* Strickle, *supra*, the court say: "Could the grantor of Pitcher have successfully maintained an action against the plaintiff for the recovery of the land in dispute at the time Pitcher purchased in their titles?" Adapting the inquiry to this case, we ask, was Barke, or Mason and

Thomas, entitled to a writ for possession under the decree in Barke *v.* Early et al. at the time plaintiff purchased in their title? Clearly not, without first paying the $968.50. Without this payment, they were not in position to assert the patent title successfully. Our conclusion is that the court erred in sustaining the demurrer, and in rendering judgment for the plaintiff, and that judgment should be for the defendants for costs. This view of the case renders it unnecessary to notice the other questions presented. Reversed.

Exceptions to Covenants of Title.

King *v.* Kilbride, 58 Conn. 109; 19 A. 519.

ANDREWS, C. J. These are two actions, between the same parties, brought on separate mortgages, and each claiming a foreclosure and the possession of the same land. It appears that on the 1st day of June, 1887, the plaintiff owned two tracts of land, — one containing ten acres, and the other, his homestead, containing one acre. On that day he mortgaged both pieces to Thomas A. Nelson, to secure his note for $1,100, payable to said Nelson or order, on demand, with interest. On the 29th day of the same month he sold and conveyed the ten-acre piece to William B. Kilbride by a deed in which the covenant against incumbrances and the covenant of warranty were as follows: "And that the same is free from all incumbrances whatsoever, except a certain mortgage to Thomas A. Nelson, dated June 1st, 1887, for $1,100. And furthermore, I, the said grantor, do by these presents bind myself and my heirs forever to warrant and defend the above granted and bargained premises to him, the said grantee, his heirs and assigns, against all claims and demands whatsoever." On the same day Kilbride mortgaged the same land to the plaintiff, to secure the sum of $1,500 by a deed in which the covenants were identical with the covenants in the plaintiff's deed to him. Kilbride orally agreed to assume and pay the note to Mr. Nelson as a part of the payment for the land. He went into immediate possession of the land so conveyed to him, and on the 15th day of August following conveyed a portion of it to the Fountain Water Company by a deed containing all the covenants, without any exception. All of these deeds were put upon record at once. It is found that the water company had no notice, actual or constructive, of the oral agreement by Kilbride to pay the Nelson mortgage, except so far as the recording of the deeds is such notice; and it is also found that the water company took its

deed in good faith, and paid full value for its land. The plaintiff has remained ever since the owner and in possession of the homestead. Kilbride proved to be insolvent, and left the premises; and the plaintiff, on the 27th day of October of the same year, in order to protect his second mortgage interest in the ten-acre tract, purchased of Mr. Nelson the note and mortgage which he had previously given to him, and Mr. Nelson thereupon transferred and assigned to the plaintiff, by a proper release deed, all his right, title, and interest in the note and mortgage; and the same are now the property of the plaintiff. The first action is brought by the plaintiff as assignee and holder of his own note to Mr. Nelson, and in the complaint he claims a foreclosure of the ten-acre piece, with possession of the same, unless the water company or Kilbride shall pay the whole amount due on that note. The defense in this action sets up, among other things, the covenant of warranty contained in the plaintiff's deed to Kilbride. The reply to the defense is a denial. The judgment apportions the debt between the two pieces of land mortgaged by the plaintiff to Mr. Nelson according to their value, and decrees a foreclosure of the ten-acre piece unless the defendants, or one of them, shall pay the sum of $556.20, and grants execution in ejectment if the money is not paid within the time limited. From this judgment the plaintiff and the Fountain Water Company both appeal. The plaintiff's reasons of appeal are that the court erred in not requiring the defendant to pay the whole of the Nelson note. The second and third reasons of appeal of the water company are, in substance, that the court erred in holding that the plaintiff was entitled to maintain the suit notwithstanding his covenant of warranty.

It appears from the finding that the plaintiff did make the covenant of warranty as alleged by the defendants, and as appears by his deed, portions of which are recited above. The covenant of warranty is a contract by which the grantor of land undertakes to protect the land granted from all lawful claims and demands existing at the time of the grant, and the contract is made not only with his immediate grantee, but with whomsoever may become the owner of the land by a title derived through the grantee. Booth *v.* Starr, 1 Conn. 144; Mitchell *v.* Warner, 5 Conn. 498; Rawle Cov. (4th Ed.) 334; 3 Washb. Real Prop. (4th Ed.) 466; 2 Sugd. Vend. (Perkins' Ed.) 240. It is not necessarily an undertaking that there is no incumbrance on the land at the time, but it is an undertaking that the purchaser and his assigns shall at all times enjoy the land free from all such incumbrances. Williams *v.* Wetherbee, 1 Aiken, 233; Rawle Cov. (4th Ed.) 215; Whitney *v.* Dinsmore, 6 Cush. 124; Russ *v.* Steele, 40

Vt. 310. Of this covenant, any act tantamount to an eviction of the grantor would be a breach and subject the grantor to damages, as if the grantee should upon demand yield the possession to one having a better title (Sterling *v.* Peet, 14 Conn. 245) or surrender to a mortgagee by a prior deed (Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 Mass. 586). A judgment in ejectment would clearly be such an act. The judgment of foreclosure and ejectment requires of the defendants a payment of money to their own grantor, and, upon their failure to do so, authorizes him to evict them; that is, to do the very act which he has covenanted with them shall not be done by any one. Such a judgment must be erroneous. And this judgment is erroneous unless there is in the case something by which the plaintiff is relieved from the obligation of his warranty. Is there any such thing? So far as the water company is concerned, the oral agreement by Kilbride to pay the Nelson note may be laid out of the case. It is found that the company had no notice of that agreement, except so far as the record of the deed is actual or constructive notice. The record disclosed an express covenant by the plaintiff to protect the defendants in their possession of the land against all claims and demands whatsoever. When there is an express contract in writing respecting any matter, there can never be an implied one in addition to it. Brown *v.* Fales, 139 Mass. 21. Still less can there be any implication contrary to the writing. Burnes *v.* Scott, 117 U. S. 582; 6 Sup. Ct. Rep. 865; Allen *v.* Rundle, 50 Conn. 9.

It is claimed by the plaintiff that the Nelson mortgage was excepted out of the covenant of warranty in his deed to Kilbride; that the exception of it from the covenant against incumbrances ought to be construed as an exception of it from the covenant of warranty. This is really an argument the other way. That an exception was made from one covenant in a deed is an argument that no exception was intended from any other. It shows that the attention of the grantor was called to the matter of making exceptions, and that, presumably, he made all the exceptions he desired to. The principle applicable is found in the maxim that the express mention of one person or thing is the exclusion of others. Besides, these covenants are distinct, and have reference to different kinds of liability. A man may not choose to guaranty his title generally, and yet may readily undertake that his grantee shall not be disturbed. 2 Sugd. Vend. (Perkins' Ed.) 281; Howell *v.* Richards, 11 East, 633, 643; Estabrook *v.* Smith, 6 Gray, 572.

It is further urged that the covenant of warranty in Kilbride's mortgage deed to the plaintiff operates in some way to prevent

the water company from taking anything under the plaintiff's covenant of warranty in his deed to Kilbride. How it has this effect is not shown. The water company is not in privity with either of the parties as to that covenant. That is a matter between other persons, by which it can neither be harmed nor helped. Certainly, the plaintiff cannot be discharged from his covenant to the water company because some one else has warranted the same land to him.

The equitable doctrine of notice, so strongly urged, and apparently so much relied on, by the plaintiff, seems to us to have no application in the case. It is not a question here of notice, but whether or not the plaintiff shall keep his covenant, It cannot be denied that the water company had notice that the Nelson mortgage covered the 10-acre piece of land. It had notice of everything which appeared on the record. By the same record from which the company derived such notice, it learned that the plaintiff had covenanted to warrant and defend that very piece of land from all claims and demands, not excepting the Nelson mortgage. If there was any defect or uncertainty in the notice which the record gave, it was because the plaintiff was himself wanting in care, in not making his deeds more specific. He is invoking the doctrine of notice. He ought not to expect others to obtain more knowledge from his deeds than he put into them. He certainly cannot take any advantage from his own omissions. He is the one to be bound by the notice given, rather than the water company by the notice received, if there is any difference; especially as it is more than likely that the water company bought its land relying on his warranty, and upon his ability, as well as on his willingness, to fulfill it. There is error in the judgment, and it is reversed so far as it is against the Fountain Water Company.

In the second suit, a foreclosure and the possession of the same 10-acre piece is claimed, unless the defendants, or one of them, shall pay the installments due on Kilbride's note to the plaintiff, and secured by his mortgage deed of the 29th day of June, 1887, The court ascertained the amount due on the note the day judgment was rendered to be $46.44, and decreed a foreclosure unless the same was paid, together with a judgment in ejectment, to be enforced on failure of payment at the expiration of the time limited. The water company appealed from the judgment on the ground that the indebtedness sought to be secured by the mortgage was not sufficiently described in it. We think there is no error. The judgment in this case is fully sustained by the reasoning in the very recent case of Winchell *v.* Coney, 54 Conn. 24; 5 Atl. Rep. 354, which is applicable to this case;

reasoning which we have no need to repeat, and no disposition to change. In this opinion the other judges concurred.

Who Can Maintain Action for Breach of Covenants of Title.

Allen *v.* Kennedy, 91 Mo. 324; 2 S. W. 142.

BLACK, J. On the fifth May, 1875, the defendant conveyed the 40 acres of land in question to Patterson by a deed containing the statutory words "grant, bargain, and sell," and also a covenant of general warranty. On the twelfth September, 1878, Patterson, by a like deed, conveyed the same land to plaintiff. Plaintiff brings this suit for damages on the covenants in the deed to Patterson.

1. There is a question made as to whether the petition declares on the covenant of seizin only, or on that and the covenant of warranty. The petition is very carelessly prepared, but we think it shows a purpose to declare on both. As the case will be remanded, the plaintiff can amend so as to bring both covenants fully on the record proper, and we shall treat the case as if such an amendment were made.

2. The plaintiff put in evidence the two deeds before mentioned, and showed that the land was a part of the swamp lands of Chariton County, and that Riddle was the owner by deeds from and through the county. He testifies that after he bought the land he found defendant had no title, and, on further inquiry, found that Riddle had taken possession long before plaintiff purchased the same. The plaintiff concedes that the full measure of his damages is the amount he paid, with interest. For proof of damages, the plaintiff relies alone on the recital of $350 consideration paid by him in his deed from Patterson; and the question is whether this made out a *prima facie* case. As to the parties to a deed, the consideration clause is *prima facie* evidence, but it has the force and effect only of a receipt, and is open to explanation and contradiction, not for the purpose of defeating the deed as a conveyance, but for the purpose of showing the true consideration. Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552; Wood *v.* Broadley, 76 Mo. 33. Generally, however, the recital in the consideration clause is not evidence of the amount paid, or the value of the premises, as to third persons. Rose *v.* Taunton, 119 Mass. 100. We have held that the recital of the place of residence of the grantee in a deed is not evidence of the fact in his own favor. Fine *v.* St. Louis Pub. Schools, 30 Mo. 166. The question arose in a foreclosure suit in a case decided by the Supreme Court of Ohio, and reported

in 1 N. E. Rep. 523. There H. sold the property, and by his contract agreed to make a deed upon payment of the purchase money. He then made the mortgage on the same premises. Thereafter the purchaser assigned his contract, and the successive assignees made divers payments. He then made a deed to the last assignee, reciting payment in full, and it was held this recital was not evidence of payment in full, as against the mortgagee. A substantial issue in this case was, how much did Allen pay, and the burden of the proof was upon the plaintiff. The statement of the amount paid in the deed is no more than the declaration of Patterson. Kennedy is no party to that deed, claims nothing under it, and we must hold there was a failure of proof. Where the contest is between a prior unrecorded deed and a subsequent recorded deed, the question is whether the holder under the recorded deed purchased in good faith for value, and without notice. The deed there may well be regarded as giving the grantee a *prima facie* standing in court, but we express no opinion here in that class of cases; the issue there is unlike the present one.

3. As to the covenant of seisin of an indefeasible estate in fee-simple, the claim is that this covenant, if broken at all, is always broken when made, and does not run with the land. Whatever may be the rule elsewhere, with us it is more than a covenant in the present tense. It is rather a covenant of indemnity, and it has often been held that it runs with the land, to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, though no title pass, yet, in either event, this covenant runs with the land and inures to the subsequent grantee upon whom the loss falls. Dickson *v.* Desire, 23 Mo. 151; Chambers *v.* Smith, *Id.* 174; Magwire *v.* Riggin, 44 Mo. 512; Jones *v.* Whitsett, 79 Mo. 188.

4. Both covenants in the Kennedy deed were broken before the plaintiff purchased; for Riddle, the owner of the title, had taken possession under it, and Patterson was without title or possession. On this state of the case, the contention of the defendant is that covenants only run with the land until breach; that they then become choses in action, which cannot be assigned. Many authorities do hold that choses in action cannot be assigned so as to enable the assignee to sue in his own name at law, but that is not the law of this State. Damages arising from the breach of the covenants in a deed may be assigned, and, when assigned, the assignee, and he alone, can sue. Van Doren *v.* Relfe, 20 Mo. 456.

The only remaining question is whether the deed to plaintiff

will operate as an assignment of the prior covenants, so as to protect the assignee as to the damages he has sustained. As having some bearing upon this question, it may be stated that, by our statute, any person claiming title to real estate may, though there be an adverse possession, convey his interest as if he were in the actual possession. Section 673, Rev. St. 1879.

Kimball *v.* Bryant, 25 Minn. 496, was an action on the covenant of seisin in a deed from defendant to Hardy, who conveyed with full covenants to the plaintiff. The grantor in the first deed had no title, and it did not appear he was even in possession. The court said: "The covenant is taken for the protection and assurance of the title which the grantor assumes to pass by his deed to the covenantee; and, where the covenantee assumes to pass that title to another, it is fair to suppose that he intends to pass with it, for the protection of his grantee, every assurance of it that he has, whether resting in right of action or in unbroken covenant; so that if, before enforcing his remedy for breach of the covenant, the covenantee execute a conveyance of the land, unless there be something to show a contrary intention, it may be presumed that he intended to confer on his grantee the benefit of the covenant, so far as necessary for his protection; that is, that he intends to pass all his right to sue for the breach, so far as the grantee sustains injury by reason of it. See, also, Schofield *v.* Iowa Homestead Co., 32 Iowa, 318.

In Wead *v.* Larkin, 54 Ill. 498, the court, after reaching the conclusion that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance, proceeds to say: "It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantee should convey before taking possession. * * * We should be inclined to say, that although the covenant of warranty is attached to the land and for that reason is said, in the books, to pass to the assignee, yet this certainly does not mean that it is attached to a paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that; but it means simply, that it passes by virtue of the privity of estate created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach."

As our covenant of seisin runs with the land, what is there said as to the covenant of warranty is equally applicable to it.

The Patterson deed contains full covenants, and it was certainly the purpose to transfer to plaintiff whatever covenants and assurances the grantor held, whether broken or unbroken, and no good reason is perceived why the intention of the parties should not be made effectual, instead of being frustrated and wholly defeated. Had Patterson brought the suit on the covenants, we are of the opinion the deed to plaintiff would have been a complete defense. The plaintiff, on making proof of damages, will be entitled to recover. That many authorities would lead to a different result is conceded; but the reason of many of them is overthrown, when it is shown that choses in action are assignable, that the covenant of seisin runs with the land, as an indemnity to the party who in fact suffers the loss, and that real property may be conveyed, though in the adverse possession of another.

The judgment is reversed, and cause remanded. All concur.

Covenant Running with the Land not a Condition.

Post *v.* Weil, 115 N. Y. 361; 22 N. E. 145.

GRAY, J. This action arose out of the refusal of the appellants' testator to complete his agreement to purchase certain lots of land in the city of New York. Their sale had been at public auction, and by its terms an indisputable title was offered to purchasers. Weil, the appellants' testator, refused to accept the deed, which was tendered to him, on the ground that, by the provisions of a former deed, on record, and through which the title of the vendors was derived, the property of which these lots were part was subject to the operation of a condition subsequent, to wit, a condition that no part of the premises should ever be used or occupied as a tavern. Whether this objection was sound and available to Weil is the question which is involved in this appeal.

After a careful consideration of the facts, and upon a review of the whole situation, I am unable to find any serious difficulty in reading the clause in question as a covenant whether we consider it on principles of strict law or of common justice. Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words

influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason. The operation of this clause, as contended for by the appellant, would have been to effect a great injustice; whereas if, as we read it, it was intended as a covenant for the protection of property, no prejudice could accrue to any one, and the purpose in the original grant would be respected and preserved in all its integrity. I am aware of the difficulty which attends the discussion of the legal question involved in this case, and also of the importance which is given to it by the fact that the courts below have held the clause in the deed to be a condition subsequent, while they have enforced the performance of the agreement of purchase upon other grounds. I shall, therefore, briefly review the facts as they appear in the record before us, in order better to demonstrate that the conclusion to be drawn from them, as to the probable intention of the parties, is that the clause under consideration could only have been inserted as a covenant.

The premises in question were formerly part of a large estate lying in the upper portion of New York island, and known as "Monte Alta." That estate and an adjoining estate, known as "Claremont," were owned and occupied as farms and country residences by one Michael Hogan. In 1807 he entered into an agreement in writing with one Jacob Mark for the sale to him of the Monte Alta estate for a sum of $16,000, and the agreement contained this clause: "Upon the special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." In 1811, four years afterwards, Hogan and wife deeded to Robert Lenox, Jacob Stout, and John Wells, upon certain trusts, both of said estates; that of Monte Alta, however, subject to agreement with Mark. These facts are disclosed, not by the agreement and deed themselves,—for they do not appear to have been recorded, and they were not produced,—but from subsequent deeds, which were made by these grantees, or trustees, of Hogan, and the Hogans, in conveyance of the properties to others. We are without information as to the reason for the non-completion of Hogan's agreement with Mark from the year 1807, when it was made, until the year 1811; and we know nothing concerning the nature of the trusts upon which Lenox and his associates in the trust referred to received and held the properties. A few months after Hogan's conveyance to Lenox and others, Monte Alta was conveyed to Mark by a deed, in which were joined, as grantors, Hogan and wife and the said trustees. That deed recited the facts of the agreement of

Hogan to sell to Mark, and of the conveyance by Hogan and wife to Lenox and others as trustees, subject to that agreement. It conveyed the fee of the premises, free of incumbrances, and with covenants of title and warranty, but with the following provision contained in the *habendum* clause, viz.: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind." The Hogans' grant was of their right, title, interest, dower, and right of dower, etc., in or to the premises described, while that of Lenox and others was directly of the premises themselves. It is quite probable that the union of the Hogans as grantors was to perfect the record title, which the absence from the records of their deed to Lenox and others might affect, and to prevent any question from being raised as to the validity of Mark's title. In the conveyance subsequently made, in 1812, of the Claremont estate, the grantors were the same as in that of Monte Alta, and the deed was similar in form; but it did not contain the clause respecting the use of the premises which I have quoted from the *habendum* clause in the deed of the Monte Alta property. In 1816 a release of that restrictive clause was, as a matter of fact, executed, and the title was thus freed from any question which might arise by reason of its existence; but, as this release had not been recorded, and was lost at the time of the sale and of the tender of the deed by the vendors, and was not discovered and recorded until about two years afterwards, and after the commencement of this suit, it cannot be considered in determining upon the right of Weil to reject the title when the deed was tendered to him. He was entitled to rest upon the state of facts, as it was proved to be, when he refused to accept the deed. In 1819, Lenox and others executed to Hogan an instrument which, after reciting that they had settled and accounted with him touching the trust property by him conveyed to them in 1811, "as far as the same had been sold, appropriated, collected, received, or disposed of by them," assigned and conveyed to him whatever remainder there might be of the trust property; and Hogan, by the same instrument, released them from all claims respecting execution of the trusts. In 1821, Joel Post became the owner of both of these estates, and he and his heirs held the same from that time until the sale by the heirs, in 1873. These are all the material facts in the case. When the purchaser objected that the estate was subject to a common law forfeiture, because of the condition subsequent reserved in the deed to Mark, the vendors answered

that the tripartite deed to Mark did not reserve a condition on the grant in fee upon which a forfeiture would inure to the grantor or his heirs in case a tavern should at any time be kept on the lands comprising the Monte Alta estate, but a covenant which, running with the land, would, while kept alive, prove an equitable protection against any injury from its breach, in favor of any subsiding interest, entitled to insist upon a performance of the covenant. In that construction of the clause in the Mark deed we think the plaintiffs were right; and, as that conclusion would dispose of the whole case, no other of the answers which they make in defense of their title need be considered. I understand the appellants' counsel to concede that this appeal must succeed on the sole point that the reservation pointed out in the deed created a condition subsequent, and in fact it must be so; for if it created a covenant the union of both of the estates in Joel Post in 1821 would have the natural and legal result of extinguishing the covenant.

Although the words of the clause in question are apt to describe a condition subsequent, reserved by a grantor, we are in nowise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties, for covenants and conditions may be created by the same words. In order that a covenant shall be read from the words of an instrument, they need not be precise nor technical, nor in any particular form. In Bacon's Abridgment ("Covenant," A) it is said: "The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." In Sheppard's Touchstone (pages 161, 162) it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words." Chancellor Kent, in his Commentaries (volume 4, *132), in speaking of whether a clause in a deed shall be taken to create a covenant or a condition, says: "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere inference and argument." The chancellor sums up the matter in this language: "The distinctions on this subject are extremely subtle and

artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case." Lord Mansfield said (Lant *v.* Norris, 1 Burrows, 290), that no particular technical words are requisite towards making a covenant; and Lord Eldon said (Church *v.* Brown, 15 Ves. 264), that covenants may be for almost anything. That they have frequently been inserted in conveyances to maintain the eligible character of property adjoining the parcel conveyed, by protecting it against the creation of nuisances of offensive structures, or against the carrying on of an injurious or offensive trade, is a familiar fact. It seems unnecessary to cite from the opinions of judges or of the writers upon the subject of jurisprudence, for there is a general *consensus* in opinion among them that the question is one always open to the determination most consistent with the reason and the sense of the thing. Reference, whether it be to the earlier or later reports, fails to aid us in deducing from them a defined principle of construction. Many, if not most, of the early cases have been those turning upon the construction of clauses in leases; and in each case, so far as the examination I have been able to give enables me to say, the court construed the clause as the circumstances and facts of that particular case seemed to demand. I would not pretend to reconcile all the decisions which have been made upon the subject; but I readily extract the principle that technical words may be overlooked where they do not inevitably evidence the intention of parties. I think the tendency of the law has been to assume towards this vexed question, as towards others which have come down from the days of the old common law, a more scientific attitude. So, if the only reason for construing a clause is in the technical words which have been used, the court may disregard them in performing the office of interpretation. If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee, as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction, and thereby place ourselves in accord with that inclination of the law, which regards with disfavor conditions involving forfeiture of estates. In this connection it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause in not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence, to that

extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance, in connection with the circumstances of the case and the intent to be fairly presumed therefrom.

Now, the first significant feature of this case, which may be referred to in determining the intention, is the agreement between Hogan and Mark. That was the agreement by which the one was to sell and the other to buy Monte Alta. In it was inserted a "special condition that no part of the land or the buildings thereon should ever be used or occupied as a tavern." That was the agreement or understanding of both parties as to a restriction upon the use the premises might be put to. Then we are to presume, from what took place in the conveyance afterwards by Hogan to the trustees of both the Monte Alta and Claremont estates, and their subsequent accounting with him, that Hogan had become financially embarassed, and had sought this equitable mode of settling with his creditors. But when the trustees carrried out the agreement which Hogan had made with Mark, and deeded the Monte Alta property to Mark, they incorporated in their deed the restriction which had been agreed to in the contract as to the use of the property. Now, the obvious and only purpose which Hogan could have had in view when the contract was made was to protect the adjacent property, which he then owned, from being injured by the vicinity of an undesirable structure or business. I think we all will agree that the presumption here, as in every other case where a restriction is inserted in a deed against undesirable structures or trades, is that the insertion was for the purpose of protecting rights which the grantor had in adjacent property. In this case the clause obviously was for the benefit of the Claremont estate. This view is reinforced by the fact that when the trustees came to sell the Claremont property no such condition was inserted in that deed. When the trustees disposed of the Monte Alta property, Hogan had ceased to have any interest in it, other than in having it bring all that could be obtained from a sale of the properties, in order to free himself from his embarrassments. When the legal estate became vested in the trustees their duty was to make the sales yield all that was possible. They had no interest to subserve by conveying the property subject to any condition subsequent. The effect, however, of a covenant in the deed to Mark, covering a restriction like that in the agreement of the parties would be to enhance the market value of the other property by preserving to the whole an eligible character. An intention that the restrictive clause

should operate as a condition subsequent seems hardly supposable under the circumstances. Except we take the words literally, no reason suggests itself for that construction. Hogan had no legal interest in the property at the time of the conveyance. What interest could he then have which his trustees might be supposed to subserve, or which he might be supposed to insist upon, in securing a reverter of the one Monte Alta estate to himself or his heirs? None is apparent; and I say, therefore, that the reason and the sense of the thing indicate that the clause is to be read as a covenant.

In construing a clause which imports into an instrument a restriction, or imposes an obligation not to do something, reliance should be placed upon the known or supposable aim of the grantor, or upon the sense of his act. So long as technical words are to be deemed unavailing to control interpretation, we should disregard them, and have resort to what may furnish some evidence of the underlying intention. In speaking of the sense of the act, I refer as well to the apparent object to be attained as to the mode resorted to in order to affect it. What reason have we to justify us in attaching to these particular words so technical a meaning, and to freight them with such serious consequences, when it appears that no such interest exists in the grantors as demands a reservation of such a condition, or makes it in the slightest degree important? Where does the necessity exist for such a technical construction? Here the grantors of the legal title had no interest in creating a reverter to themselves, for they were mere trustees. Their grantor, whatever his beneficial interest in the trust, had no apparent interest to subserve, which is pointed out or which is discoverable, in planning a reverter of the estate for a breach of condition. There was no interest which was not adequately met by the creation of a covenant or limitation in trust that the property should not be used for the one certain purpose mentioned. I think it more agreeable to reason, as it is to the conscience,— and it well comports with the character and origin of this deed, — if we say that the office of this clause was simply to restrain the generality of the preceding clause. See Chapin *v.* Harris, 8 Allen, 594. The words "provided always, and these presents are upon this express condition," seem to me to serve the purpose of restricting that the use of the premises which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one, that words alone should not be deemed to create a condition subsequent and to be capable of importing possible future forfeiture of estate, except where they do introduce some new clause the sense of

which is not referable to, and in qualification of, some preceding clause, and evidences some part of the consideration for the grant of the property by the imposition of an obligation upon the grantee. Looking at these words, may we say, as they stand in the deed, that they are conditional in sense, when they in reality serve to qualify the generality of the grant in the language which precedes them? I think we cannot, in reason.

In Avery *v.* Railway Co., 106 N. Y. 142; 12 N. E. Rep. 619, we have a late exposition of the views of this court upon the effect to be given to language in deeds purporting to convey upon express conditions. In that case it was sought to enjoin the defendant from maintaining a fence upon a strip of land dividing its depot premises from the plaintiff's hotel premises, and from thus blocking up a passage-way between the hotel and depot. The land upon which defendant built the fence was conveyed by deeds which contained the following provisions: "This conveyance is upon the express condition that the said railroad company, its successors or assigns, shall at all times maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, so called [being the plaintiff's premises], adjacent to the premises hereby conveyed," etc. The grantors in these deeds had acquired title under a will to the hotel property, and their testator had been the grantor of the property used by the defendant for its depot. The defendant denied the right of plaintiff, to whom the hotel property had been leased by the devisees, to maintain the action, alleging that the language of the provision in the deeds created a condition subsequent, which could only be taken advantage of by the grantors and their heirs. The plaintiff claimed that it must be construed as a covenant. Judge Peckham, delivering the opinion of the court, said: "We incline to the construction contended for by the plaintiff. The fact that the deed uses the language 'upon condition,' when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. * * * Construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings." After referring to the facts, he continues: "All these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the hotel property, and was not meant to create a condition subsequent. * * * It was intended to be an agreement or covenant between the parties running with the land, providing for this access or right of way, so

as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage. See Stanley *v.* Colt, 5 Wall. 119; Countryman *v.* Deck, 13 Abb. N. C. 110. Courts frequently, in arriving at the meaning of the words in a written instrument, construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damage can be recovered. See Hil. Real Prop. (4th Ed.), p. 526, § 13; 2 Washb. Real Prop. (3d Ed.), c. 14, subd. 3, p. 3 *et seq.*" The avenue of reasoning by which the court reached their conclusion in that case is the one which ought to lead us in our conclusion now, — that the clause in question in the case at bar was intended as a restriction created for the benefit of the adjoining property expressed in the strongest terms, and which was enforceable as a covenant running with the land, and was not a condition subsequent, imposed for the personal benefit of the grantors and their heirs.

For the reasons stated, the judgment appealed from should be affirmed, with costs. All concur (Andrews, J., in result), except Ruger, C. J., not voting.

CHAPTER XXIII.

WILLS.

Claiborne *v.* Radford, 91 Va. 527; 22 S. E. 348.
In re Walter's Will, 64 Wis. 487; 25 N. W. 538.
Cartwright *v.* Cartwright, 1 Phillimore, 90.
In re Hunt's Will, 110 N. Y. 278; 18 N. E. 106.
Riggs *v.* Palmer, 115 N. Y. 506; 22 N. E. 189.
Newcomb *v.* Webster, 113 N. Y. 191; 21 N. E. 77.
Pickens *v.* Davis, 134 Mass. 252.

Form of Will — When Instrument is a Deed or Will.

Claiborne *v.* Radford, 91 Va. 527; 22 S. E. 348.

Keith, P. The appellant, Ellen Du Val Claiborne, who was Ellen Du Val Radford, filed her bill in the circuit court for the county of Bedford, making Du Val Radford (in his own name, and as administrator of R. C. W. Radford, deceased, and as administrator d. b. n. of Octavia Du Val Radford, deceased), Thomas S. Radford, and others, de-

fendants, in which she asks that a decree may be entered requiring Du Val Radford to pay over to her the sum of $10,000, which she claims as being in his hands, and as belonging to her. The defendant answered the bill, and, among other defenses, set out the fact that the complainant had, by deed, conveyed her interest in the money which she demanded of him to W. V. Wilson, upon a certain trust, and avers that the property demanded of him is claimed by the said W. V. Wilson, as trustee, and prays that the complainant may be required to amend her bill so as to bring her trustee before the court. This amended bill was filed, and the trustee made a party. In the amended bill the complainant presents for the consideration of the court the construction of the paper, in form a deed, dated the 2d of July, 1891, and which is as follows: —

"This deed, made this the 2nd day of July, in the year of our Lord, 1891, between Ellen Du Val Radford, party of the first part, and Wm. V. Wilson, Jr., trustee, party of the second part, witnesseth, that for and in consideration of the sum of five dollars, the receipt of which is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell, and convey unto the said party of the second part, all of her stock, bonds, and other evidences of debt, to be held by him, the said party of the second part, and his qualified successors, upon the following trusts, for the sole use and benefit of the said Ellen Du Val Radford for and during her life: The said trustee shall have power and authority to collect any and all outstanding debts whenever he may think proper to do so, and relend the principal, upon good city real estate security. The interest and dividends on all the property hereby conveyed shall be collected by the said trustee, and paid over to the said Ellen Du Val Radford, and after deducting from the same reasonable compensation for the said trustee for his services. The stocks and railroad bonds now owned by the said party of the first part, and by this deed conveyed, shall not be sold by the trustee without the written consent of the said Ellen Du Val Radford, and in case of such sale the proceeds shall be reinvested or loaned out as hereinbefore provided by the said trustee. All the said property hereby conveyed that is held by any bank or individual as collateral security for any debt of the said party of the first part shall be loaned for such debt, and the said trustee shall have the power to make the proper transfers, if necessary, for the settlement of such debt, but the same shall not be liable for any debt hereafter created by either of the parties of this deed. And at the death of the said party of the first part the property hereby conveyed

shall pass to the children of the said party of the first part, if she leave any, but if she leave no children the same shall pass to her heirs at law, as though the same were real estate. Witness the following signature and seals: [Signed] Ellen Du Val Radford. [Seal.] Wm. V. Wilson, Jr. [Seal], Trustee.

"State of Virginia, City of Lynchburg, to wit: I, Thos. D. Christian, a notary public in and for the city and State aforesaid, do certify that Ellen Du Val Redford and William V. Wilson, Jr., whose names are signed to the writing above, bearing date on the 2nd day of July, 1891, have acknowledged the same before me in my city aforesaid. Given under my hand this, the 2nd day of July, 1891. [Signed] Thos. D. Christian, Notary Public.

"Virginia. In the clerk's office for the corporation court for the city of Lynchburg, the 3rd day of August, A. D. 1891. This deed was presented, and, upon the annexed certificates of acknowledgments, admitted to record. Teste: [Signed] S. G. Wingfield, Clerk."

Complainant claims that this paper is not a deed, by which her interest in the property mentioned was divested, but that it is a power of attorney creating W. V. Wilson an agent for the management of the property mentioned therein, and that the concluding clause is testamentary in its character, and that the whole instrument, whether regarded as a power of attorney or a paper testamentary, is revocable; and, proceeding upon this idea, she, on the 5th day of October, 1892, executed another paper, under seal, by which she undertakes wholly to revoke and annul the aforesaid instrument, and to terminate the authority and interest of William V. Wilson as trustee. The record presents two questions for our decision; one arising upon the original bill, and to which I shall no further advert than to say that, as the whole matter in controversy is settled by the disposition which we have made of the amended bill, no reference need be made to it in this opinion. We will address ourselves, therefore, to ascertaining the construction to be placed upon the paper purporting to be a deed, and dated the 2d of July, 1891. The arguments of counsel on both sides have been exhaustive of every phase of the subject, and the citation of authorities has presented for our consideration a great number of adjudged cases, many of which are not accessible to us here. In our view of the case, however, it is wholly free from doubt and difficulty, and may be determined by reference to well-established elementary principles. To us, the attempt to treat this paper either as a power of attorney or as a will seems to rest upon an entirely erroneous con-

ception. As is said in the case of Ewing *v.* Jones (Ind. Sup.), 29 N. E. 1057, there is nothing in the paper, from beginning to end, to indicate that it is a will, or partakes of the character of a will. "In form, in substance, in recital, and declaration, it is a deed of trust." It is true that some of the instructions given the trustee as to the management of the property during the lifetime of the grantor would have been entirely appropriate in an instrument creating a mere agency, but there are also terms employed unusual, unnecessary, inappropriate, and improper for such purpose; and, taken as an entirety, it may be safely affirmed that no precedent can be produced of a power of attorney or will, or writing partaking of the double nature of power of attorney and will, presenting the characteristics of that under consideration. It grants, bargains, sells, and conveys absolutely, and without reservation or conditions, all the stocks and bonds, and other evidences of indebtedness, the property of the grantor, Ellen Du Val Radford, to William V. Wilson and his qualified successors, in trust for the sole use and benefit of said Ellen during her lifetime. Is this the language of a power of attorney, or of an instrument creating a trust? It operates to vest in Wilson whatever interest Miss Radford may have had in the property described. Its operation is not postponed until her death, but it takes effect upon the instant of the execution of the paper. This deed was written, signed, and acknowledged before a notary public on the 2d day of July, 1891. On the 3d day of August of the same year it was admitted to record in the office of the corporation court of the city of Lynchburg, and the grantor was married on the 8th day of the same month. The deed transfers all her personalty to her trustee. It uses apt words for the creation of an equitable separate estate. It excludes the marital rights of the husband in the life estate which it creates, and carefully guards against his enjoyment of it after her death by providing that it shall pass to her children, if she shall have any, or, if there are no children, that it shall pass to her heirs at law, as real estate. Looking to the surrounding circumstances, and to the language of the deed, it may fairly be considered that the contemplated marriage furnished the motive for the instrument, and that it was the purpose of the grantor to guard against the improvidence or the ill fortune of her future husband. Counsel for the appellant seize upon the phrase, "at the death of the party of the first part the property hereby conveyed shall pass to the children of the party of the first part, if she have any," etc., as clearly impressing a testamentary character upon the paper, but we cannot concur in this view. As we have seen, the property, upon the execution of the deed,

vested at once in the trustee, and the direction of the clause just quoted is that it "shall pass," not from the grantor — for it has already passed from the grantor, by virtue of the preceding part of the paper — but that it "shall pass" from the trustee in whom it had vested, as directed, at her death. The code has provided for the protection of the property of married women by creating what, for the sake of brevity, has been designated as "statutory separate estate," but by section 2294 of the code the right to create equitable separate estates is preserved unaffected by the statute law. We are of opinion, therefore, that whether the deed of July 2, 1891, be regarded as an ordinary trust, or as a settlement made in contemplation of marriage, and creating a separate equitable estate in the grantor for life (in which aspect we are disposed, under all the circumstances of the case, to view it), we consider it as a valid, subsisting, irrevocable instrument. We are of opinion that there is no error in the decree complained of, and that it must be affirmed.

Will, Written in Language Unknown by Testator, Valid.

In re Walter's Will, 64 Wis. 487; 25 N. W. 538.

Appeal from the circuit court, Sheboygan County.

An instrument in writing purporting to be the last will and testament of Minna Walter, late of the county of Sheboygan, deceased, was presented for probate to the county court of that county by George V. Whiffen, the executor therein named, and was admitted to probate by that court. The instrument is written in the English language. At the time of her death the estate of the testatrix consisted of her wearing apparel, some bedding, and about $1,000 in choses in action. It does not appear that she had any other property at her death. In her will she bequeathed her wearing apparel to Sarah Bolt, her neighbor, and the residue of her property to one Herman Millert, who, when the will was executed, was about 18 years of age, and with whom the testatrix lived. Neither of the legatees were relatives of the testatrix. She left surviving her three brothers residing in Wisconsin, and sisters and descendants of sisters residing in Germany. These were her nearest of kin. The brothers of the testatrix, Frederick, Martin, and Christian Schultz, appealed to the circuit court from the order of the county court admitting such instrument to probate as the last will and testament of their deceased sister. The issue *devisavit vel non* was tried by the court, and resulted in the following findings of facts: —

"(1) That said Minna Walter died on the sixth day of Feb-

ruary, 1884, at the town of Sheboygan Falls, in Sheboygan County, and an inhabitant of said county. (2) That the instrument propounded as the will of said deceased was, on this twenty-third day of November, 1881, signed by said Minna Walter by affixing her mark thereto in the presence of three witnesses, who subscribed the same, and her name was therein signed by Francis Williams in her presence and by her express direction. (3) That said will was written in the English language at the request and according to the directions of said Minna Walter, and she was a German and did not understand the English language; but said Minna Walter fully stated to Francis Williams, who draughted said instrument, through an interpreter who understood both languages, the objects and bequests therein written; and after said instrument was written it was read over to her, and explained in German by said interpreter; and said instrument fully expressed her purposes as there declared. (4) That said Minna Walter was at all of said times of sound mind, memory, and understanding, and of lawful age and under no constraint. (5) That said instrument so propounded for probate was by said Minna Walter then and there in the presence of three subscribing witnesses, declared as her will; and said witnesses, at her request, and in her presence and the presence of each other, subscribed the said instrument under the attestation clause as subscribing witnesses, and said witnesses were competent thereto."

From the facts thus found the court determined that the instrument in question is the last will and testament of the deceased, and that the same was duly and legally executed. Judgment was thereupon entered affirming the order of the county court, so admitting the instrument to probate. From that judgment the same three brothers of the testatrix have appealed to this court.

LYON, J. The learned counsel for the appellants challenges the accuracy of each and every finding of fact except the first, which states the residence of the testatrix and the date of her death, and that portion of the third which finds she was a German and did not understand the English language. He argues with much ingenuity that the testimony fails to prove any of the propositions of fact thus challenged. After an attentive perusal of the testimony we find ourselves unable to agree with counsel. We think that every fact essential to the validity of the will was established by a fair preponderance of the testimony; or, at least, that there was no such clear preponderance of testimony against any material finding of fact as will authorize this court to set it aside. We do not deem it necessary, in this

opinion, to set out the testimony and discuss it at length. The statement of our conclusions therefrom must suffice. Aside from the finding that the testatrix did not understand the language in which her alleged will was written, it cannot be doubted that the other findings of fact fully justify the admitting of the instrument to probate as the last will and testament. We are thus brought to consider the only question of law presented by this appeal, to wit: Should an instrument executed with all the formalities which the law makes essential to a valid execution of a will which purports to be the last will and testament of the deceased person so executing it, and which expresses his will and intentions, be denied probate for the sole reason that such person did not understand the language in which the instrument was written?

This is an interesting and, perhaps, an important question. It has not heretofore been raised in this court to our knowledge, and the industry of counsel has failed to find a direct adjudication of the question elsewhere. However, in Redfield on Wills, to the statement in the text that "it seems to be well settled that the testator may put his will in any language he may choose," there is a note in which the author says: "We doubt if the common law will allow of a written will being expressed in a language not understood by the testator. That would seem indispensable to any understanding execution of the instrument." Vol. 1, p. 166 (4th Ed.), note 8.

No case or authority is cited to support the opinion intimated in the last extract. The reason given for this opinion is, in effect, that a person cannot have an understanding of the contents of an instrument unless it be written in a language he knows. True, he may not get such understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understandingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. Such is the foundation of our belief in very many most important selected truths in theology, science, and history. Important writings are frequently signed without perusal, the signer relying upon the statement of another, who knows what the instrument contains, as to its contents. If the information states such contents truly, the signer knows just what he has signed. Were an issue made up as to whether the signer of a written instrument knew its contents when he signed it, and the proof should show that he never read it, but was accurately informed of its contents orally, before he signed it, by a person

who had read it, the issue would necessarily be found in the affirmative; that is, that the signer knew the contents of the instrument. There can be no doubt, we think, that a person who signs an obligation or promise with knowledge of its contents, imparted to him by parol, is liable thereon, although it may be written in a language he does not understand. The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it?

No good reason is perceived why this is not also true of wills. Of course it is essential to a valid will that the testator should have had an intelligent understanding and comprehension of its contents when he executed it. The formalities required by law in the execution of wills are prescribed for the purpose (among others) of preserving satisfactory evidence that the testator in each case had such understanding of the contents of his will. But the law does not require that he shall read his will before execution, or be able to read it, as a condition to its validity. If such were the law, the blind, or those persons who from illiteracy or other cause are unable to read, could never make a valid written testament. The same would be true of many persons who may desire to execute a written will when *in extremis*, and who are otherwise competent to do so. It has long been held that persons thus circumstanced may execute valid written wills. And if the will of any such person is drawn in accordance with his instructions, although not read over to him, it seems now to be settled that, if otherwise sufficient, it is a valid will. 1 Redf. Wills, p. 57, c. 3, sec. 6, § 5.

We perceive no substantial difference in principle between the cases above referred to and one in which a will is drawn up in a language which the testator does not understand. In cases belonging to either class the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute. Such proof was made in the present case, and in addition thereto it was proved that the instrument was drawn in strict compliance with the instructions of the testatrix in that behalf.

In view of the well-known fact that quite a large percentage of the people of this State do not understand the English language, and of the probability that many wills of such people, written in English, have been admitted to probate, we should adopt the rule here suggested, even though the argument against it were much stronger than it is. Otherwise great mischief might be done by defeating the real will of the testators, carefully expressed, and duly verified in the manner prescribed by

statute, and by unsettling estates supposed to be settled, and divesting rights of property believed to be fully vested. If the same circumstance had existed generally in this country when Judge Redfield wrote the intimation above mentioned, we greatly doubt whether he would have thought that the rule there suggested (even conceding it to be a rule of the common law) was at all applicable to the condition and circumstances of our people.

Our conclusion is that, because the instrument in question was freely executed by the testatrix in due form of law, with full and accurate knowledge of its contents and in accordance with her instructions (she being of sound mind), it was properly admitted to probate, and established as her last will and testament, notwithstanding it was written in the English language, which she could not read or understand. The judgment of the circuit court is affirmed.

What Insanity on the Part of the Testator will Avoid the Will.

Cartwright *v.* Cartwright, 1 Phillimore, 90.

Sir William Wynne. The question in this cause arises upon the will of Mrs. Armyne Cartwright, deceased, which has been opposed and propounded on behalf of the contending parties.

The will is on all sides admitted to be in the handwriting of the deceased; and it is in these words: —

"Wigmore Street, August 14, 1775. I leave all my fortune to my nieces, the daughters of my late brother, Thomas Cartwright, Esq., except £100 each to my executors, and one year's wages to my servants and mourning. I appoint Mrs. Mary Catherine Cartwright, my nieces' mother, and Thomas George Skipworth, Esq., of Newbold Revel, in Warwickshire, my executors, and trustees for my nieces until they come of age or marry; if any of them should die sooner, their share to go to the survivors or survivor. "Armyne Cartwright."

It appears to have been inclosed and sealed up in a cover; and upon the back of the cover is written in the handwriting of the deceased, "This is my will. A. Cartwright." The will is written in a remarkably fair hand, and without a blot or mistake in a single word or letter. Pleas have been given in on both sides, and there is a pretty full account of the family and connections of the deceased, and her affections, and I think it clearly appears the will is as proper and natural as she could have made,

and it is likewise as comformable to her affections at the time. * * *

The only witness then, that has given any kind of account of the writing of the will is Charity Thom, who was present at the time; there was another witness of the name of Gore, but she is dead; therefore Charity Thom is the only person who can give any account of what passed; and the account she gives is extremely material; for I cannot agree with what was said by Dr. Nicholl, that this will relies entirely upon the face of the will itself, and upon the evidence of Mrs. Cottrell, and the proof of handwriting for its support. I think the evidence of Charity Thom goes very materially to support it; her evidence is in these words; she says to the 15th and 16th articles of the first allegation, "That whilst the said Dr. Battie visited and attended the said deceased, he desired the nurse and the deponent and her other servants to prevent her from reading or writing, as he gave it as his opinion that reading and writing might disturb and hurt her head; and in consequence thereof she, the said deceased, was for some time kept from the use of books, pens, ink, and paper; that, however, some time prior to the writing the will in question in this cause, but precisely as to time the deponent cannot speak, she, the said deceased, grew very importunate for the use of pen, ink, paper, and frequently asked for it in a very clamorous manner; that Dr. Battie endeavored to dissuade and pacify her, and told her that whatever she wrote he must appear as a witness against, but that if she would wait till she got well he would be a witness for her; that the said deceased continuing importunate in her desire to have pen, ink, and paper, the said Dr. Battie in order to quiet and gratify her consented that she should have them, telling the deponent and Elizabeth Gore, the nurse, that it did not signify what she might write, as she was not fit to make any proper use of pen, ink, and paper; that as soon as Dr. Battie had given his permission that she should have pen, ink, and paper, the same were carried to her; and her hands, which had been for some time before kept constantly tied, were let loose, and she, the said deceased, sat down at her bureau and desired this deponent and the nurse to leave her alone while she wrote, and they, to humor her, went into the adjoining room, but stood by the door thereof so as they could watch and see the said deceased as well as if they had been in the same room with her; that the said deceased at first wrote upon several pieces of paper, and got up in a wild and furious manner and tore the same, and went to the fireplace and threw the pieces in the grate, one after the other; and after walking up and down the room many times in a wild

and disordered manner, muttering or speaking to herself, she wrote, as the deponent believes, the paper which is the will in question; but the deponent further saith that at the time now deposed to the said deceased had not shown any symptoms whatever of recovery from her disorder, and in the deponent's opinion she had not then sufficient capacity to be able to comprehend or recollect the state of herself, her family, or her affairs, and during the time she was occupied in writing, which was upwards of an hour, she, by her manners and gestures, showed many signs of a disordered mind and insanity." She says to the 25th interrogatory, "that the deceased was occupied upwards of an hour, nearly two hours as well as the deponent can at this distance of time recollect, in making the will in question; that is, from the time of the pen, ink, and paper being given her, until she left off writing; that the respondent and Elizabeth Gore, the nurse, went out of the room into the adjoining room, and left the said deceased alone in the room, but not out of their sight; that she said she was going to write, but the respondent does not recollect whether she said she was going to make her will, but the respondent understood that she was writing a will; that when the said deceased was left in the room by herself she was so agitated and furious that the respondent was very fearful she would attempt some mischief to herself, but she did not do any; that a candle was given to the said deceased to seal what she had written, but the respondent cannot recollect what length of time the candle was by her; that the respondent and also the nurse were always cautious of trusting a candle near the said deceased, but on this occasion they did permit her to have a candle notwithstanding she showed many marks of derangement and insanity at the time, this respondent and the nurse being at hand and watching her to prevent any mischief; that the said deceased seemed very earnest in what she was about, but by no means closely settled, as whilst she was writing she frequently started up and walked up and down the room in an agitated manner; that it was not customary to untie the said deceased's hands, or to leave her alone when she desired it, at times when she was greatly agitated and disordered, although sometimes in consequence of her earnest entreaties the respondent and the nurse would untie her for a little, and on the occasion now particularly deposed to she was so untied in consequence of the permission which Dr. Battie had given her to have pen, ink, and paper, but she was not left alone, as the deponent and the nurse stood at the door of an adjoining room behind the said deceased, but not above two or three yards distant from the bureau where she sat to write."

The fact then, as it appears by the evidence of this witness, is,

that the paper was written by the testatrix herself, no other person being present but the witness who gives the account and Elizabeth Gore who is since dead, neither of whom gave her any manner of assistance; and she tells you, that the deceased having first of all shown great eagerness and anxiety for pen, ink, and paper, did write this will the moment she obtained them without any assistance from anyone; but it is said that the condition of the deceased at this time was such that she was utterly incapable of doing that or any other legal act, because it must be rational. They have certainly completely proved that the deceased was early afflicted with the disorder of her mind, I think about the year 1759, and she continued under the influence of that disorder pretty near two years, and after that she returned to her father's house being supposed to be perfectly recovered, and that she continued to reside there from that time to his death; that after that being in possession of her fortune she went about the year 1768 to housekeeping herself, and continued so to do as a rational person till 1774, and in the month of November in that year she went on a visit to her relation, Lord Macclesfield, at Shirburn in Oxfordshire; that on the 26th of November she returned to London in a disordered and disturbed state; at first she was attended by a physician, Dr. Fothergill, who found it was a disorder of the mind, and what he had not directed his attention or study to. It is proved that in the latter end of January or beginning of February, 1775, Dr. Battie was called in, and he treated her as an insane person, and sent a nurse to take care of her in the way they always do send nurses to patients disordered in mind. In general her habit and condition of body and her manner for several months before the date of the will was that of a person afflicted with many of the worst symptoms of that dreadful disorder, and continued so certainly after making the will, which was the 14th of August, 1775. They have certainly made out that. Now what is the legal effect of such proof as this? Certainly not wholly to incapacitate such a person, and to say a person who is proved to be in such a way was totally and necessarily incapacitated from making a legal will. I take it the rule of the law of England is the rule of the civil law as laid down in the second book of the Institutes (Inst. Lib. 2, tit. 12, sec. 2) "furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur." There is no kind of doubt of it, and it has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being

proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as a thing to be first examined and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. The manner he has laid down is (it is in the part in which he treats of what persons may make a will), says he, the last observation is, "If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament." Unquestionably there must be a complete and absolute proof the party who had so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month; I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended; I look upon it if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time,

that is completely sufficient. What does appear to be the case from the evidence of these witnesses? As to Charity Thom, who seems to me to be the principal witness, she gives an opinion of her own, and that opinion is against the validity of the act, and she expressly says over and over that the deceased at the time this was done was not sane and was not capable of knowing what she did; that is the result of her evidence. The court, however, does not depend upon the opinion of witnesses, but upon the facts to which they depose. All the facts which are deposed to (it does appear to me) are sane; the witness' opinion arising from her observations does not give any foundation at all for saying the testatrix was insane at the time of making the will; her opinion that the deceased was insane at such time was founded on bodily affections which were extraneous. What is the fact? She says that the deceased whilst employed about the act rose frequently and walked backwards and forwards about the room, that she did not set down closely to the business, that she started up, and that she tore several papers and threw the pieces into the grate, then wrote others, and did not appear to her to act in such a way as a person who was calm would do. In my apprehension, it appears from this account her manner of doing it was this: she wrote several papers, and if she saw any mistake whatever trifling she was dissatisfied and probably vexed she did not write in such a way as fairly to answer her own intention; the paper itself has no mark of irritation; a more steady performance I never saw in my life; and it seems hardly consistent that a person wild and furious and in such a degree of insanity as she is stated to be should write in such a way. It seems to me a very extraordinary thing, but whatever outward appearance there was it had no effect on the writing itself; she has wrote it without a single mistake or blot or anything like it. What is the construction? that she was endeavoring to write her will, which she had taken a determination to do; that she made mistakes and destroyed those papers in which she had made them, that she knew how to correct them, and did correct them, and at length wrote and finished as complete a paper as any person in England could have done. Is this insanity? In my apprehension, it is not; if seems to me she was vexed at her mistakes, which I think shows that she had at that time her senses about her, and I think it appears likewise she was not then in fact in the disturbed condition she was before and after. They say they were generally forced to keep the strait waistcoat upon her, that even then she would thrust out her arms if she could, and strive to thrust her fingers in their eyes, and in short do everything that would do mischief. Is there any mischief in

the present case when the strait waistcoat is taken off? Nothing like it; as soon as it is taken off she says, "Give me pen, ink, and paper;" and when it is given her she says, "Leave me, for I am going to write;" and they go out of the room; she is not disturbed at their watching her, but pursues her own intention and completes the paper; she inquires the day of the month, and an almanack is given to her by one of the nurses who was watching her, and the day of the month was pointed out to her; she then calls for a candle; and they say they used to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper; but still in this case they give her a candle that she may use it in order to seal the paper; no harm was done of any kind, and none attempted; everything that was done was for the purpose of completing the act; and am I to conclude she was insane, because she might have bodily affections, irritations of nerves, when everything which was rational is done, and as collectedly and exactly as any person of the clearest sense would have done, and of her own head entirely. The gentlemen have said all this is mere form. Is it mere form that a person so situated as she was should of her own accord write a will containing the most rational disposition of her property, leaving all her fortune to her nieces, the daughters of her deceased brother who were the most natural to her, omitting her nephew who was possessor of a large fortune? Is it a mere form that she should appoint for her executors and trustees the mother of those nieces, and her nearest relation by the father's side, describing accurately the place where he lived, and that she should create a survivorship amongst them if any should die before twenty-one? Is this only form? It is the very essential part and substance of a will, and that will as rational a will as she or any other person could have made. Therefore, taking the fact to be that it was done of her own accord, it leaves nothing to be proved; that being established puts the matter beyond all possibility of doubt, and I think there can be no question but that she had a legal capacity; but, say they, we can hardly admit this is quite such a paper as it appears, and that it is the mere spontaneous act of the testatrix herself; they surmise and to be sure it is as groundless a surmise in point of evidence as possible, that it was done at the suggestion of Mrs. Cottrell, but it appears that she was at that time out of town and had been so for a month before; but is the court to suppose that without evidence, and is there anything to support it? certainly not, and I cannot presume any such thing. If you have a mind to prove this was by the suggestion of Mrs. Cottrell, you may; if you do not, I must take it to be, what it appears from the evi-

dence, the pure and spontaneous act of the party herself, and that Mrs. Cottrell knew nothing of it till she was informed of it. * * *

I am of opinion in this case that the deceased by herself writing the will now before the court hath most plainly shown she had a full and complete capacity to understand what was the state of her affairs and her relations, and to give what was proper in the way she has done. She not only formed the plan, but pursued and carried it into execution with propriety and without assistance. In my apprehension that would have been alone sufficient, but it is further affirmed by the recognition and the delivery of the will. Therefore, under all these circumstances I have no doubt in pronouncing this to be the legal will of the deceased.

Proof of Publication of Will.

In re Hunt's Will, 110 N. Y. 278; 18 N. E. 106.

GRAY, J. Probate of the will of the deceased was refused, and the will rejected by the surrogate, for the reason that it was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments. His decree was reversed by the general term, and as it is stated in the body of the judgment appealed from to this court that the reversal was upon questions of fact as well as questions of law, we are called upon to examine the facts, and to determine them for ourselves. They are few and not conflicting, and establish that the instrument offered for probate as the will of the deceased was wholly in his handwriting, as was also the attestation clause which was signed by the witnesses, and that the will was signed by the deceased. The attestation clause was as follows: "We, the undersigned witnesses, have signed the within in the presence of each other, and of the testator, who acknowledged it to be his last will and testament." It is insisted that there is no proof that the subscription to the will by the testator was made in the presence of the witnesses, or that it was acknowledged by him to have been made to each of the attesting witnesses. The recollection of the two witnesses as to the transaction was imperfect; but each testified, however, in substance, that the circumstances must have been as stated in the attestation clause, or he would not have signed it. It is not pretended that there is any ground for rejecting the will, except that it was not executed in exact compliance with the statutory provisions referred to. The statute has surrounded the execution of wills with certain formalities in order to prevent imposition, undue influence, and fraud;

but it is well settled by authority that a substantial compliance with the statute is always sufficient. No particular form of words is required or necessary to effect publication. Lane *v.* Lane, 95 N. Y. 494. And recently in Re Beckett, 103 N. Y. 167; 8 N. E. Rep. 506, a case of holographic will, so close and severe a criticism of the terms and manner of publication was considered needless. We have here a testamentary disposition of the estate, which the witnesses recognized to be in the handwriting of deceased, signed, unquestionably, by him; and an attestation clause, also in the handwriting of deceased, signed by them, which states it was signed by them in the presence of each other, and of the testator, and that the testator acknowledged the instrument to be his last will and testament. The only supposed doubt as to the matter is cast by the inability of the witnesses to recollect precisely what took place in detail. We think that it is a sufficient compliance with the statutory requirements if, in some way or mode, the testator indicates that the instrument the witnesses are requested to subscribe as such is intended and understood by him to be his executed will. In probate cases the courts should look to the substance of the transaction, and see that there was no opportunity for imposition or fraud. This will must have been presented to the witnesses by the testator for them to sign, and such an act was equivalent to a communication by him that he intended to give effect to the paper as his will. If the paper was signed in the presence of the witnesses, that act was a sufficient compliance with the statute as to acknowledgment of the subscription. If signed before being presented to them, the exhibition of the paper, with his acknowledgment that it was his last will and testament, was a sufficient acknowledgment of the signature and publication of the will, within the rule laid down by this court in Re Phillips, 98 N. Y. 267. In the case of Lewis *v.* Lewis, 11 N. Y. 220, cited by the surrogate, it appeared affirmatively by the witnesses that the paper was so folded that they did not see any subscription, and that testator only said that "I declare the within to be my free will and deed." Such affirmative proof of what took place brought the case clearly within the operation of the statute, and invalidated the execution. In that same case, however, Allen, J., said: "Mere want of recollection on the part of the witnesses will not invalidate the instrument, and in the cases cited by counsel the courts establishing the wills propounded have done so upon the ground that they were satisfied from the circumstances proved that the wills were duly executed, and that the witnesses had forgotten, thus relieving the parties interested against the infirmities of humanity and the uncertainty

of human recollection." The attestation clause here is entirely consistent with the execution of the paper by testator in the presence of the witnesses, and nothing in the circumstances of this case pointing to any fraud or undue influence, and none being charged, we think the presumption should prevail that all formalities have been observed, and we therefore are disposed to sustain rather than to reject this testament, for we feel satisfied that it was duly executed and published.

The appellant further insists that the general term, upon reversing the decree of the surrogate, should have ordered a jury trial of the material questions of fact arising upon the issues, and cites section 2588 of the Code of Civil Procedure in support of his point. That section provides that "where the reversal of a decree by the appellate court is founded upon a question of fact, the appellate court must, if the appeal was taken from a decree made upon a petition to admit a will to probate, or to revoke the probate of a will, make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties." We do not think this provision applies to this case, and it was proper for the supreme court to adjudge as it did. Although the judgment, as amended, stated that the decree of the surrogate was reversed by the general term, upon questions of fact as well as questions of law, we cannot regard that as controlling on the point raised. We do not find that the reversal was dependent upon conflicting evidence. There was no conflict of facts at all. The only evidence was given by the two witnesses to the will. There was no difference between the surrogate and the general term of the supreme court as to any question of fact, and there could be no issue for a jury. The two courts only differed in the conclusion to be drawn from the facts, and that presents simply a question of law. For equivalent reasons this court, in Re Martin, 98 N. Y. 193, a case probably overlooked by counsel, held that "the appeal to the supreme court was not governed by section 2588 or by Sutton *v.* Ray, 72 N. Y. 482," on which the appellant also relies in this case. It was there said that "they only applied when the reversal is founded upon a question of fact." We think the statute should receive a reasonable construction, and that literal obedience is not to be given to its language where it would work an unreasonable, if not absurd, result. The language in this section requires an order for a jury trial only where the reversal "is founded upon a question of fact;" and the legislature undoubtedly intended that only where such was actually the case, and there was a real conflict of evidence, and the surrogate's court and the supreme court differed on the case, should the conflict be

settled by a jury trial in the mode prescribed; but that a new trial before a jury should be deemed necessary, where there is no conflict in the facts, and the matter is one of the conclusion from the facts, is not a construction reconcilable with reason, and we should refuse our sanction to such a construction. The insertion in the decree of the statement as to the grounds of the reversal, I think, we are not bound to take in the sense given to it by the appellant, but should regard it simply as the warrant, under section 1338, for our examination of the facts of the case. The judgment appealed from was proper, and should be affirmed, with costs. All concur.

Effect of Murder of a Testator by a Devisee on Latter's Rights Under the Will.

Riggs *v.* Palmer, 115 N. Y. 506; 22 N. E. 189.

EARL, J. On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm, and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate in case she survived him she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that

therefore it must have effect according to the letter of the law. It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer. The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statutes is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called "rational interpretation;" and Rutherford, in his Institutes (page 420), says: "Where we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express." Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bac. Abr. "Statutes," 1, 5; Puff. Law. Nat. bk. 5, c. 12; Ruth. Inst. 422, 427, and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction; and it is said in Bacon: "By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is

a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." 9 Bac. Abr. 248. In some cases the letter of a legislative act is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle as frequently quoted in this manner: *Æquitas est correctio legis generaliter latæ qua parte deficit.* If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 Bl. Comm. 91, the learned author speaking of the construction of statutes, says: "If there arise out of them collaterally any absurd consequences manifestly contradictory to common reason, they are with regard to those collateral consequences void. * * * Where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it;" and he gives as an illustration, if an act of parliament gives a man power to try all causes that arise within his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity, or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate?

Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of Insurance Co. *v.* Armstrong, 117 U. S. 599; 6 Sup. Ct. Rep. 877. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void, and set aside; and so a particular portion of a will may be excluded from probate, or held inoperative, if induced by the fraud or undue influence of the person in whose favor it is. Allen *v.* McPherson, 1 H. L. Cas. 191; Harrison's Appeal, 48 Conn. 202. So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him?

If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisdiction of our State, and an offense against public policy. Under the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. Dom. Civil Law, pt. 2, bk. 1, tit. 1, § 3; Code Nap., § 727; Mack. Rom. Law, 530, 550. In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime. My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

Our attention is called to Owens *v.* Owens, 100 N. C. 240; 6 S. E. Rep. 794, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was nevertheless entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband, and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow, and willfully and intentionally deprives herself of the support and protection of her husband. As she might have died

before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim *volenti non fit injuria* should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result — first upon the trial of Palmer for murder, and then by the referee in this action. We are therefore of opinion that the ends of justice do not require that they should again come into question. The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer. All concur, except Gray, J., who reads dissenting opinion, and Danforth, J., concurs.

Gray, J. (*dissenting*). This appeal presents an extraordinary state of facts, and the case, in respect to them, I believe, is without precedent in this State. The respondent, a lad of 16 years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the State reformatory. The action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent's favor canceled and annulled. The appellants argument for a reversal of the judgment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will, or a new will from being made, by his crime; and that he terminated the enjoyment

by the testator of his property, and effected his own succession to it, by the same crime. They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong. To sustain their position the appellants' counsel has submitted an able and elaborate brief, and if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked, after the testator's death, through an appeal to the courts, when the legislature has by its enactments prescribed exactly when and how the wills may be made, altered, and revoked, and apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters. Modern jurisprudence, in recognizing the right of the individual, under more or less restrictions, to dispose of his property after his death, subjects it to legislative control, both as to extent and as to mode of exercise. Complete freedom of testamentary disposition of one's property has not been and is not the universal rule, as we see from the provisions of the Napoleonic Code, from the systems of jurisprudence in countries which are modeled upon the Roman law, and from the statutes of many of our States. To the statutory restraints which are imposed upon the disposition of one's property by will are added strict and systematic statutory rules for the execution, alteration, and revocation of the will, which must be, at least substantially, if not exactly followed to insure validity and performance. The reason for the establishment of such rules, we may naturally assume, consists in the purpose to create those safeguards about these grave and important acts which experience has demonstrated to be the wisest and surest. That freedom which is permitted to be exercised in the testamentary disposition of one's estate by the laws of the State is subject to its being exercised in conformity with the regulations of the statutes. The capacity and power of the individual to dispose of his property after death, and the mode by which that power can be exercised, are matters of which the legislature has assumed the entire control, and has undertaken to regulate with comprehensive particularity.

The appellant's argument is not helped by reference to those

rules of the civil law, or to those laws of other governments, by which the heir, or legatee, is excluded from benefit under the testament if he has been convicted of killing, or attempting to kill, the testator. In the absence of such legislation here, the courts are not empowered to institute such a system of remedial justice. The deprivation of the heir of his testamentary succession by the Roman law, when guilty of such a crime, plainly was intended to be in the nature of a punishment imposed upon him. The succession, in such a case of guilt, escheated to the exchequer. See Dom. Civil Law, pt. 2, bk. 1, tit. 1, § 3. I concede that rules of law which annul testamentary provisions made for the benefit of those who have become unworthy of them may be based on principles of equity and of natural justice. It is quite reasonable to suppose that a testator would revoke or alter his will, where his mind has been so angered and changed as to make him unwilling to have his will executed as it stood. But these principles only suggest sufficient reasons for the enactment of laws to meet such cases.

The statutes of this State have prescribed various ways in which a will may be altered or revoked; but the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way. The words of the section of the statute are: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. Where, therefore, none of the cases mentioned are met by the facts, and the revocation is not in the way described in the section, the will of the testator is unalterable. I think that a valid will must continue as a will always, unless revoked in the manner provided by the statutes. Mere intention to revoke a will does not have the effect of revocation. The intention to revoke is necessary to constitute the effective revocation of a will, but it must be demonstrated by one of the acts contemplated by the statute. As Woodworth, J., said in Dan *v.* Brown, 4 Cow. 490; "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation." The same learned judge said in that case: "The rule is that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will." And see Goodright *v.* Glazier, 4 Burrows, 2512, 2514; Pemberton *v.* Pemberton, 13 Ves. 290. The finding of fact of the referee that presumably the testator would have altered his will had he known of his grandson's murderous intent cannot affect the question. We may concede it to the fullest extent, but still the cardinal objection is undisposed of, — that the making and the revocation of a will are purely matters

of statutory regulation, by which the court is bound in the determination of questions relating to these acts.

Two cases, — in this State and in Kentucky, — at an early day, seem to me to be much in point. Gains *v.* Gains, 2 A. K. Marsh. 190, was decided by the Kentucky court of appeals in 1820. It was there urged that the testator intended to have destroyed his will, and that he was forcibly prevented from doing so by the defendant in error or devisee; and it was insisted that the will, though not expressly, was thereby virtually revoked. The court held, as the act concerning wills prescribed the manner in which a will might be revoked, that, as none of the acts evidencing revocation were done, the intention could not be substituted for the act. In that case the will was snatched away, and forcibly retained. In 1854, Surrogate Bradford, whose opinions are entitled to the highest consideration, decided the case of Leaycraft *v.* Simmons, 3 Bradf. Sur. 35. In that case the testator, a man of eighty-nine years of age, desired to make a codicil to his will, in order to enlarge the provisions for his daughter. His son, having the custody of the instrument, and the one to be prejudiced by the change, refused to produce the will at testator's request, for the purpose of alteration. The learned surrogate refers to the provisions of the civil law for such and other cases of unworthy conduct in the heir or legatee, and says: "Our statute has undertaken to prescribe the mode in which wills can be revoked [citing the statutory provision]. This is the law by which I am governed in passing upon questions touching the revocation of wills. The whole of this subject is now regulated by statute; and a mere intention to revoke, however well authenticated, or however defeated, is not sufficient." And he held that the will must be admitted to probate. I may refer also to a case in the Pennsylvania courts. In that State the statute prescribed the mode for repealing or altering a will, and in Clingan *v.* Michel-tree, 31 Pa. St. 25, the Supreme Court of the State held, where a will was kept from destruction by the fraud and misrepresentation of the devisee, that to declare it canceled as against the fraudulent party would be to enlarge the statute.

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee; nor is there any such contractual element, in such a disposition of property by a testator, as to impose or imply conditions in the legatee. The appellant's argument practically amounts to

this: that, as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it. But more than this, to concede the appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in People *v.* Thornton, 25 Hun, 456, "enhance the pains, penalties, and forfeitures provided by law for the punishment of crime." The judgment should be affirmed, with costs.

Danforth, J., concurs.

Revocation by Subsequent Will or Codicil.

Newcomb *v.* Webster, 113 N. Y. 191; 21 N. E. 77.

Opinion by DANFORTH, J.

Appeal from a judgment of the general term, fifth department, of the Supreme Court, affirming a judgment of Monroe County special term, upon trial by the court without a jury. There was no dispute about the facts. It appeared that Angeline B. Walker died on the 7th of June, 1884, leaving real and personal property in Monroe County; that by her will, dated April 23, 1881, she by its *first* clause, gave to her sister Olive, for life, house No. 89 Frank street; remainder to Mrs. A. B. Johnson, Mary A. Hatch, and Milicent J. Johnson. By the *second* clause, to Anna Newcomb for life, house and lot No. 14 Spencer street; remainder to the surviving children of Anna. *Third.* She directed house No. 89½ Frank street to be sold, and its proceeds applied in part to the erection of a monument on "my lot in

Mt. Hope;" $100 to the Mt. Hope commissioners, to keep the same and lot in order; and the residue to Emeline Soper, William Springstead, Huber Herrick, Nelly Soper, Francis Spencely, and Elliot Hodges, of Rochester, N. Y., share and share alike, after first paying $100 each to Mrs. Rose Chrichton, of Rochester, N. Y., and to Charles P. Hodges, of Cleveland, Ohio, which "I bequeath to them." The legacy of William Springstead to be deposited in the Monroe County Savings Bank, and paid over, with its accumulations, when he arrives at 21 years of age. *Fourth.* Directs No. 102 Jones street to be sold, and proceeds to be divided between the six children of George Walker. *Fifth.* She gives her piano to Robert P. Newcomb, son of Anna L. Newcomb; and all her household furniture and household goods and effects to her nieces, Mrs. Adelia Johnson, Mary Hatch, Anna Newcomb, Ida Springstead, of Rochester, and Minerva Herrick, of Watertown, N. Y.; and also all residuary interests and estate; and finally appoints Aaron N. Newcomb and Edward Webster executors of the will, with power to sell and convey real estate. It further appeared that in the year 1882 she sold lot 14, referred to in the second clause of the will, and also sold 102 Jones street, referred to in the fourth clause. Afterwards, in 1884, she executed an instrument in these words: "I, Angelina B. Walker, of the city of Rochester, county of Monroe, and State of New York, do make, publish, and declare this first codicil to my last will and testament, hereby revoking so much of my said last will and testament as is consistent with the provisions of this codicil: *Item First.* I direct one hundred dollars to be set aside and paid over to the commissioners of Mount Hope as a perpetual fund, the interest of which shall be annually expended to keep the lot in said Mount Hope belonging to my late husband, Robert Walker, and my brother, Perry Hodges. *Second.* I give and bequeath to the Rochester Home for the Friendless one hundred and fifty dollars. *Third.* I give and bequeath to the Frank Street (otherwise Sixth) Methodist Episcopal Church of Rochester, to be expended by the trustees thereof towards erecting a parsonage for the use of their pastor, the sum of five hundred (500) dollars. *Fourth.* I give and bequeath to the Rochester Orphan Asylum three hundred dollars, to be expended for the rearing and education of an orphan, Belle Peer by name. *Fifth.* I give and bequeath to Hubert Herrick of Rochester, five hundred dollars, to be placed on interest in the Monroe County Savings Bank, paid over to him on arriving at twenty-one years of age. If he shall die before that date, then said legacy shall go to his mother, Minerva Herrick. *Sixth.* I give and bequeath to my sisters, Emiline Soper and Olive J.

Hatch, each the sum of five hundred (500) dollars. *Seventh.* I give and bequeath to the six (6) children of my brother-in-law, George Walker, each the sum of two hundred (200) dollars. *Eighth.* I give and bequeath to my four nieces, Mrs. Anna Newcomb, Frances Spencely (of Canada), Adelia B. Johnson, and Mary N. Hatch, all the rest, residue and remainder of my estate both real and personal, to be divided equally between them, and share and share alike." The trial judge found "that no part of said will is revoked by said codicil, except the second and fourth clauses thereof, and the residuary devise in the fifth clause of said will, but that all other legacies and devises in said will and codicil ought to be carried into effect."

Both will and codicil were admitted to probate by the surrogate of Monroe County, and administration granted to the persons named in the will as executors, and, some difference having arisen as to the effect of the codicil, this action was brought by Executor Newcomb and others, against Executor Webster and others, for the purpose of obtaining a judicial construction of its provisions. The plaintiffs contend that the codicil revokes all the provisions of the will, except those relating to the appointment of executors, while the defendants suppose that both instruments can stand, and the legacies and devises in each take effect. The court at special and general terms have substantially sustained the view of the defendants, and from that decision the plaintiffs appeal. It may be taken as a well-settled general rule that a will and codicil are to be construed together, as parts of one and the same instrument, and that a codicil is no revocation of a will, further than it is so expressed. Westcott *v.* Cady, 5 Johns. Ch. 343. But, if regarded as one instrument, it is found to contain repugnant bequests in separate clauses, one or the other, or both, must fail; and therefore the rule is that of the two the bequest contained in the latter clause shall stand. The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made. Nelson *v.* McGiffert, 3 Barb. Ch. 158. In the case under consideration it appears that the testatrix, in her life-time, and after the making of the will, so dealt with the principal real estate described in it as by sale to revoke the gifts mentioned in the second and fourth clauses. She also acquired other real estate, and entertained a desire that beneficiaries other than those first

selected, should share in her bounty. These circumstances would naturally require a redistribution or her estate, and in view of them we think it clear that the testatrix intended to make a new disposition of her entire property. Such is at any rate the effect of the language employed by her. There is, moreover, an express revocation of so much of the will as is inconsistent with the provisions of the codicil. If we apply this language literally, it is obvious that the entire will is to be disregarded, except so much as appoints executors and defines their powers. The codicil does not deal with that subject, and to that extent the testatrix was justified in regarding the will as a subsisting instrument. The codicil does, however, make a complete disposition of all the property of the decedent, either by special legacy or residuary clause. It is capable of operation without aid from the will, and in fact is entirely independent of it. The property, divided according to its terms, would leave nothing to apply upon the legacies or bequests of the will. The codicil, moreover, introduces new beneficiaries, and, while it provides also for persons already named in the will, does so, not by referring to the will, or by way of increase or addition to shares given by it, but evidently by substitution; and then by formal and explicit language the testatrix gives to her four nieces all the rest and remainder of her estate, both real and personal, to be divided equally among them. The remainder here spoken of is that which is left after satisfying the legacies provided for in the same instrument, and it is impossible for the disposition made by the will to stand with that made by the codicil. Both instruments were, however, properly admitted to probate, for the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil. The plaintiffs are, we think, entitled to a decree to that effect, and, so far as the judgment appealed from is to the contrary, it should be reversed, with costs to the appellant. But as the defendants have heretofore succeeded, they also should have one bill of costs, both to be paid out of the estate. All concur.

Effect of Revocation of a Later Will on an Earlier Will not Canceled.

Pickens *v.* Davis, 134 Mass. 252.

Appeal from decree of probate court, admitting will of Mary Davis.

C. ALLEN, J. The two questions in this case are, first,

whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as a matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In Reid *v.* Borland, 14 Mass. 208, the second will was invalid, for want of due attestation. In Laughton *v.* Atkins, 1 Pick 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has been often said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.), 154–156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824, in Usticke *v.* Bawden, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a later, revocatory will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also Moore *v.* Moore, 1 Phillim. 406; Wilson *v.* Wilson, 3 Phillim. 543, 554; Hooton *v.* Head, 3 Phillim. 26; Kirkcudbright *v.* Kirkcudbright, 1 Hagg. Ecc. 325; Welch *v.* Phillips, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "if a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards canceled, yet the better opinion seems to be that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (p. 529, *n.*). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict., c. 36, sec. 22 of which provided that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived other

than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation of a former will, such former will would not be revived by the cancellation or destruction of the later one. Major *v.* Williams, 3 Curt. Ecc. 432; James *v.* Cohen, 3 Curt. Ecc. 770, 782; Brown *v.* Brown, 8 El. & Bl. 876; Dickinson *v.* Swatman, 30 L. J. (N. S.) P. & M. 84; Wood *v.* Wood, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. Cutto *v.* Gilbert, 9 Moore P. C. 131. See also Nelson *v.* McGiffert, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in James *v.* Marvin, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operate instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in Simmons *v.* Simmons, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in Colvin *v.* Warford, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In Harwell *v.* Lively, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. * * * Calculated as it is to

subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also Barkdale *v.* Hopkins, 23 Ga. 332. The courts of Mississippi in 1836, and of Michigan, in 1881, adopted the same rule. Bohanan *v.* Walcot, 1 How. (Miss.) 336; Scott *v.* Fink, 45 Mich. 241. It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. Lawson *v.* Morrison, 2 Dall. 286, 290; Boudinot *v.* Bradford, 2 Yeates, 170; *s. c.* 2 Dall. 266; Flintham *v.* Bradford, 10 Penn. St. 82, 85, 92.

On the other hand, in Taylor *v.* Taylor, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by Randall *v.* Beatty, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, statutes have been enacted substantially to the same effect as the English statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other States. Concerning these statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reason-

able and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of canceling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. Major *v.* Williams, and Dickinson *v.* Swatman, above cited. Rudisill *v.* Rodes, 29 Grat. 147. But this results from the express provision of the statute.

In the present case there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight would be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in the evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intent to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive dec-

laration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true that it may not be proper to prove the direct act of cancellation, destruction, or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of Sugden *v.* St. Leonards, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of Keen *v.* Keen, L. R. 3 P. & D. 105, is to the same effect. See also Gould *v.* Lakes, 6 P. D. 1; Doe *v.* Allen, 12 A. & A. 451; Usticke *v.* Bawden, 2 Add. Ecc. 123; Welch *v.* Phillips, 1 Moore P. C. 299; Whitely *v.* King, 10 Jur. (N. S.) 1079; Re Johnson's Will, 40 Conn. 587; Lawyer *v.* Smith, 8 Mich. 411; Patterson *v.* Hickey, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited, in Collagan *v.* Burns, 57 Maine, 499, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the probate court reversed.

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